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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1348

J. M. FIELDS, INC.,

Petitioner,

—VS.—

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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J. M. FIELDS, INC.,

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PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. M. FIELDS, INC., hereinafter referred to as "Fields", petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on November 16, 1973, as modified on rehearing January 17, 1974. Respondent Secretary of Labor is hereinafter referred to as "the secretary".

Opinions Below

Included in the Appendix hereto are copies of the opinion (A. 3a) and judgment (A. 1a) of the United States Court of Appeals for the Fifth Circuit rendered November 16, 1973 (Case No. 72-1066); the Court's modification thereof on rehearing rendered January 17, 1974 (A. 19a); the judg-

ment (A. 21a) of the United States District Court for the Middle District of Florida; and the District Court's Findings of Fact (A. 26a) and Conclusions of Law (A. 31a).

Jurisdictional Statement

Proceedings were initiated by the Secretary of Labor, United States Department of Labor, in the United States District Court for the Middle District of Florida. Jurisdiction was based on the Fair Labor Standards Act of 1938, 29 U.S.C., §217.

Fields appealed to the United States District Court of Appeals for the Fifth Circuit which rendered its opinion and judgment on November 16, 1973 (A. 1a to 18a). An order on petition for rehearing was rendered by that Court on January 17, 1974 (A. 19a).

Jurisdiction in this Court is based upon The Judicial Code, 28 U.S.C. §1254(1), and Rule 19, 1(b) Rules of the Supreme Court of the United States.

Questions Presented

Fields seeks review before this Court of a decision involving momentous questions of first impression in the construction of a significant statute, the Equal Pay Act of 1963, 29 U.S.C., Section 206 (d) (1). The Courts of Appeal in two circuits have previously reached opposing results as to the same issues and this position and interpretation of this statute affects not only Fields but substantial business interests of all regional and national retail chain stores.

The result of these conflicting judicial standards for enforcement of the Equal Pay Act is to create unreasonable and oppressive judicial standards which differ in the different judicial circuits where Fields operates its business enterprises.

1. Whether the scope of injunctive relief for violation of Section 6(d)(1) of the Fair Labor Standards Act of 1938, as amended (Equal Pay Act of 1963), may lawfully extend beyond those isolated establishments found to be the sites of violations to include other commonly-owned establishments where no discrimination in wages, solely on account of sex, was alleged or found, and where there has been no showing of any policy of such discrimination?

2. Whether the scope of injunctive relief for violation of Section 6(d)(1) of the Fair Labor Standards Act of 1938, as amended (Equal Pay Act of 1963), may lawfully extend beyond the single employment classification in those isolated establishments wherein violations were alleged and found, to include all employment classifications in every other commonly-owned establishment, although violations in such other establishments and classifications were neither alleged or found and where there has been no showing of any *policy* of discrimination?

3. Whether an employer's mere knowledge of the existence of the Fair Labor Standards Act of 1938, as amended, is lawfully sufficient as the sole and exclusive predicate for a judicial finding that his violation of the Act was wilful for purposes of application of the limitation on actions provision of the Portal-to-Portal Act of 1947?

4. Whether injunctive relief for an alleged violation of Section 6(d)(1) of the Fair Labor Standards Act of 1938, as amended (Equal Pay Act of 1963), may lawfully issue:

(a) Where the Secretary has not carried the burden of demonstrating substantial equality between jobs, and has therefore failed to prove the asserted violations, existence of which is a condition precedent to the injunctive relief; and

(b) Where the Secretary has been judicially relieved of carrying the aforesaid burden, fails to demonstrate the presence of substantial equality and the employer, after having had the burden of proof shifted to him, assertedly fails to prove the absence of substantial equality.

Constitutional and Statutory Provisions Involved

The Equal Pay Act of 1963, 29 U.S.C., §206(d)(1) provides:

> (d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who

> is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Statement of the Case

The District Court found that Fields had committed nonwilful violations of the EPA in the single job category of area supervisors in three separate establishments in one State out of its then sixty-six retail store chain, located in fifteen other States. Fields was enjoined from future violations in any and all job classifications in all of its stores, and was ordered to make payment of back wages to eighteen employees[1] (A. 22a).

Fields appealed and questioned whether a nationwide injunction for a violation of the EPA was lawful in light of the record of isolated violations at three stores, and in view of the EPA's "establishment" and job by job criteria.[2]

The Secretary cross-appealed and argued that the District Court erroneously had found a difference in skill, effort and responsibility between men and women "area supervisors" who were responsible for selling "hardline"

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[1] Section 206(d)(3) provides that amounts owing to employees as a result of violations of the EPA are denominated "unpaid minimum wages or unpaid overtime compensation."

[2] Section 206(d)(1) relates an employer's equal pay obligation to employees at a particular establishment.

and "softline" merchandise. Also, that the District Court erroneously had found that Fields' violations were not wilful for the purpose of applying the three-year statute of limitations prescribed by Section 6 of the Portal-to-Portal Act of 1947. 29 U.S.C., §255(a).

A. *The Scope of Injunctive Relief.*

The Secretary claimed EPA violations only at Fields' three stores in Tallahassee, Eau Gallie and Merritt Island, Florida in the single job classification of area supervisors. The Court of Appeals concedes that proof was limited thereto.

The Court of Appeals' opinion sustaining chain-wide injunctive relief rested not upon finding a policy of discrimination, but exclusively upon a finding, unsupported by the record, that Fields' employment practices were centrally administered by regional and home-office personnel directors. The unrebutted proof was that the company policy, from June, 1965, made local store managers responsible for initial recruiting, interviewing, selecting and hiring their own Area Supervisors.[3] Store managers also had primary responsibility for supervisory appraisal of Area Supervisors' work,[4] and pay increases were determined by store operations supervisors rather than by Fields' industrial relations staff.

Fields' industrial relations staff included regional personnel directors and a vice president for industrial relations. Its duties were to recruit store management; super-

[3] Simmons (A. 37a); Renshaw (A. 38a); Henry (A. 39a to 41a); Salter (A. 42a to 44a).

[4] Simmons (A. 45a to 47a).

vise payroll administration; supervise compliance with the FLSA and other employment practices laws; conduct training activities for management candidates, and act in an advisory capacity to store operations personnel.[5]

The Court of Appeals' finding that all wage increases were subject to approval by either the regional personnel director or the home office (A. 17a) was contrary to and irreconcilable with the only evidence on the subject: namely, that wage increases were approved "in the field," and were reviewed by the industrial relations staff, only to ascertain compliance with total payroll budget.

Nevertheless, the Court of Appeals held the District Court had not abused its discretion in granting chain-wide injunctive relief, and affirmed the judgment to that extent.

Apart and aside from the question of significant central control was the issue of administrative necessity. On that ground, too, the Court affirmed the chain-wide injunction and held:

> It would frustrate the broad purposes of the FLSA in suits involving large corporate defendants with extensive branch operations to require the Secretary to investigate and prove violations in all or substantially all of the defendant's branches to justify the issuance of a chain-wide injunction. Considerations of administrative necessity are persuasive as warranting the chain-wide injunction issued below.

The Court then found the injunction impermissively broad because its terms applied not only to the single class of employees (Area Supervisors) involved in the action but as well to all Fields' employees, regardless of job

[5] Simmons (A. 45a to 46a); Walker (A. 48a to 49a).

classification. Since there was no claim or proof of discrimination affecting other job categories, the Court modified the injunction to limit its applicability to Area Supervisors.

The Secretary filed an alternative motion to strike from the opinion that portion which limited the scope of the injunction to Area Supervisors, or for a rehearing. He contended that the limitation created a conflict with *Hodgson* v. *First Federal Savings and Loan Assn.*, 455 F.2d 818 (5th Cir. 1972), wherein the Court of Appeals refused to limit injunctive relief for age discrimination to the particular job category in which the violation occurred.[6]

Fields replied[7] that the alleged violation concerned only Area Supervisors; that the proof was limited to that one job category in the three Florida stores; and that to grant so broad an injunction would create a presumption of wrongdoing and undercut any future defense Fields might otherwise assert concerning different employment classifications. The *Savings and Loan* case *(supra)*, was easily distinguished, Fields emphasizing that the Secretary's proposal contradicted *Hodgson* v. *Golden Isles Nursing Home, Inc.*, 468 F.2d 1256 (5th Cir. 1972).

The Court treated the Secretary's alternative motion as a petition for rehearing, granted it, and deleted from its opinion language narrowing the injunction to include only Area Supervisors.

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[6] The Age Discrimination In Employment Act, 29 U.S.C., §621, *et seq.*, does not include the defenses available under the EPA, i.e., establishment by establishment and job by job.

[7] The Court requested a reply on this issue.

B. *Wilful Violation.*

The District Court found scattered instances of discrimination in the three Fields' stores—not wilful but the unintended result of hiring at the prevailing wage in the local market.[8]

The Court of Appeals' opinion concedes that the Fields' industrial relations staff pursued a positive action program designed to secure chain-wide compliance with the EPA, including periodic examination of store practices and personnel files with violations reported to the home office. It nevertheless reversed the District Court, holding that the test of wilfullness to be applied in cases concerned with civil liability for violations of the FLSA was that enunciated in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1970): "Did the employer know that FLSA was in the picture?" The Court of Appeals discounted Fields' argument that the record, which showed isolated violations (at best), together with a cessation of violations prior to the trial, indicated—at most—*negligence and not wilfullness*, poor judgment perhaps, but not bad motive or wrongful intent.

C. *The Burden of Proof.*

The District Court found and concluded that the jobs of hardline and softline Area Supervisors entailed appreciably different degrees of skill, effort and responsibility—hence, the two jobs could not be compared for the purposes of the EPA.[9]

The Court of Appeals considered those Findings of Fact so conclusory in nature as to preclude the necessity of

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[8] Finding of Fact, number 21 (A. 31a).

[9] Findings of Fact, numbers 6, 7, 8 and 22 (A. 28a, 31a).

applying the "clearly erroneous" standard of Rule 52(a), *Federal Rules of Civil Procedure. Baumgartner* v. *United States,* 322 U. S. 665 (1944); *United States* v. *Yellow Cab Company,* 338 U. S. 338 (1949).

It then held that the Secretary had met the burden of showing "substantial equality" between hardline and softline Area Supervisors. But that required a threshold finding that the tripartite prerequisites to substantial equality between the jobs had been demonstrated by first proving substantial equality in skill, effort and responsibility. On that score, the Court (i) found no basic difference in responsibility; (ii) overturned the District Court's findings that more skill was required in the job of hardline, as opposed to softline Area Supervisors; and (iii) remanded for further findings as "to the comparative degrees of effort and responsibility" because "the findings of fact permit no conclusion with regard thereto (A. 12a to 13a).

The contradiction is apparent, the Circuit Court first holding the Secretary has met the burden of showing substantial equality but then remanding because, upon the record, *it cannot make a determination as to effort and responsibility—two of the three essential and indispensable elements* (skill, effort and responsibility) *necessary for the initial holding.*

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's Opinion Is in Direct Conflict on the Same Points of Law With the Opinions of This Court and of Other Courts of Appeals.

A. *The Opinion Approving a Chain-Wide Injunction Is in Direct Conflict With* NLRB v. Express Publishing Co., *312 U.S. 426 (1941)*; Hodgson v. Corning Glass Works, *474 F.2d 226 (2nd Cir. 1973)*; *and with* Hodgson v. American Can Co., *440 F.2d 916 (8th Cir. 1971)*.

1. Introduction—The Issue Defined.

The Court of Appeals' opinion concedes that the Secretary neither alleged nor established violations of the EPA at any of Fields' sixty-six facilities other than the three Florida stores directly involved in the action. Nor has issue been taken with the District Court's finding that the violations were not as widespread within the three stores as had been alleged.[10] Nevertheless, the Court of Appeals held that it would frustrate the broad purposes of the FLSA in suits involving large corporate defendants, with extensive branch operations, to require the Secretary to investigate and prove violations in substantially all of Fields' branches to justify the issuance of a chain-wide injunction; that considerations of administrative necessity were persuasive in warranting such broad injunctive relief. The Court's conclusion in this regard is in direct conflict

[10] The District Judge found no violations of the EPA between men and women area supervisors in the softline departments at two of the three stores. Findings 16 and 20, Findings of Fact (A. 30a to 31a).

on the same point of law with opinions of the Second and Eighth Circuits and with this Court.

2. Irreconcilable Conflict With This Court and Between the Circuits.

This Court, on numerous occasions, has condemned the issuance of broad injunctions either phrased in the language of the statute or which enjoins future violations unlike or unrelated to that charged. *NLRB* v. *Express Publishing Co.*, 312 U. S. 426 (1941); *FTC* v. *Henry Broch & Co.*, 368 U. S. 360 (1962). Under the same factual circumstances, the Second Circuit denied the Secretary's request for a company-wide injunction against twenty-six branch plants of the Corning Glass Works, where violations were proven at only three factories and one plant at Corning, New York. *Hodgson* v. *Corning Glass Works, supra*:

> ". . . Corning had been endeavoring since 1966—sincerely, if ineffectively—to bring, itself into compliance. There was no evidence of widespread violations of the Act, either at the Corning plants or its 26 branch plants nation-wide. . . . Yet so broad an injunction put Corning under threat of contempt for any alleged violation of the Equal Pay Act in respect of any category of employee in all but one of Corning's many plants.
>
> We agree with the point made by the Eighth Circuit in another Equal Pay Act case *Hodgson* v. *American Can Co.*, 440 F.2d 916, 921 (8th Cir. 1971), that absent a showing of a policy of discrimination which extends beyond the plants at issue here, there is no basis for a nation-wide injunction. . . ." *Corning Glass Works, supra* at 236.

In *American Can*, company wide injunctive relief embracing several plants was denied because the Secretary

did not prove Equal Pay Act violations at more than one plant. *Hodgson* v. *American Can Co.*, 440 F.2d 916, 921 (8th Cir. 1971).

3. The Fifth Circuit's View Is Legally and Factually Untenable.

We respectfully submit that the Fifth Circuit's opinion is untenable in at least three respects:

(a) *No Policy That Fosters or Condones Discrimination*

The Court reached beyond the proof and assumed (without finding) a proclivity on Fields' part to violate the EPA, as well as a policy that fostered unlawful discrimination, however unwittingly.[11] In fact, as in *American Can*, not only was there no showing of a policy of discrimination, but the opinion itself concedes that Fields endeavored to bring itself into compliance, as did the employer in *Corning Glass*.

(b) *The Establishment by Establishment Criterion Disregarded*

The opinion overlooks the unique *establishment by establishment* criterion expressed in the EPA.

Unlike the minimum wage and overtime restrictions of the FLSA, which does not distinguish between practices

[11] In *Wirtz* v. *Atlas Roofing Manufacturing Co.*, 377 F.2d 112, 116 (5th Cir. 1967) the court determined prospective injunctive relief by considering the employer's previous acts of non-compliance, and the need to insure future compliance. This comported with *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (injunctions should be limited to the extent necessary to insure future compliance with FLSA). Also see *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) to the effect that broad prospective injunctive relief is appropriate on a showing of a "proclivity for unlawful conduct" or a "record of continuing and persistent violations of the Act", neither of which was present here.

at an employer's separate facilities, the EPA prohibits discriminatory pay practices "within any establishment in which such employees are employed." [12] The unique "establishment" feature of the Act has been confirmed by an interpretative regulation of the Wage-Hour Administrator.[13] Although the EPA does not define the term "establishment", the Administrator construes it to have the same meaning it has in Section 213(a)(2) and elsewhere in the FLSA. 29 C.F.R., §800.103. As used therein, "establishment" means a single "unit store." 29 C.F.R., §779.304. The Administrator's interpretative regulations receive substantial weight in construing the FLSA. *United States* v. *American Trucking Assns.*, 310 U.S. 534, 549 (1940); *Idaho Sheet Metal Works* v. *Wirtz*, 383 U.S. 190-205 (1966).

Thus, absent a finding that a discriminatory pay practice exists at each of a nationwide employer's separate establishments,[14] or that an employer has a history of violations,[15] or that an employer's policies foster discrimina-

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[12] 29 U.S.C., §206(d)(1).

[13] " . . . It is clear from the language of the Act that in each distinct physical place of business where employees of any employer work . . . , *the obligations of the equal pay requirement must be determined separately with reference to those of his employes who are employed in that particular establishment.* Accordingly, *where there are a number of distinct physical places of business in which an employer's employees are employed, compliance* with the equal pay provisions *must be tested within each establishment* for any workweek by comparing the jobs and pay of those only of his employees who are employed there during that workweek." 29 C.F.R., §800.104 (1967); 32 F.R. 2378 (Emphasis supplied).

[14] Cf. *Beneficial Finance Co.* v. *Wirtz*, 346 F.2d 340 (7th Cir. 1965).

[15] *Wirtz* v. *Atlas Roofing Manufacturing Co., supra; Hodgson* v. *Parke d/b/a Southwestern Guard Service*, 413 F. 2d 1364, 1368 (5th Cir. 1969), on remand 324 F. Supp. 1297 (SD Tex. 1971).

tion,[16] an injunctive order will be restricted to those establishments where violations have been found—as was done in *Corning Glass* and *American Can* (*supra*).[17]

(c) *The "Job-by-Job" Criterion Disregarded*

The opinion further overlooks the need to judge asserted violations, and to fashion an injunction, on a job-by-job basis.

The payment of different rates to males and females, though they work in the same establishment, does not constitute a *per se* violation of the Act. To prove a violation, the Secretary must show that the lower-paid employees are performing equal work on jobs, the performance of which requires "substantially equal" skill, effort and responsibility, and which are performed under similar working conditions. *Hodgson* v. *Fairmont Supply Co.*, 454 F. 2d 490, 493 (4th Cir. 1972).[18]

Thus, in *Hodgson* v. *Golden Isles Nursing Home, Inc.*, 468 F. 2d 1256, 1258 (5th Cir. 1972), the Fifth Circuit rejected the Secretary's request for a conclusive determination that in all hospitals and nursing homes across the country, aides and orderlies perform equal work:

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[16] *Shultz* v. *First Victoria National Bank*, 420 F. 2d 648 (5th Cir. 1969); *Brennan* v. *General Motors Acceptance Corp.*, 482 F. 2d 825 (5th Cir. 1973).

[17] The individual store in a retail chain is an "establishment" for the purposes of the EPA. *Hodgson* v. *Robert Hall Clothes, Inc.*, 326 F. Supp. 1264 (D.C. Del. 1971), 473 F.2d 589 (3rd Cir. 1973).

[18] As construed by the Wage-Hour Administrator, the term "equal skill, effort and responsibility" refers to three separate tests, each of which must be met in order for the equal pay standard to apply. 29 C.F.R., §800.122.

> "The differences or similarities in each case must determine the ultimate outcome under the Equal Pay Act . . . (the legislative history of the Act) underscores the necessity of case-by-case analysis. By substituting the term 'equal work' for 'comparable work', which was originally suggested, Congress manifested its intent to narrow the applicability of the Act." *Id.*, at 1258.

The order on rehearing, which refused to narrow the injunction to apply only to Area Supervisors, comports neither with the record, the EPA or with the Fifth Circuit's own *Golden Isles* opinion. The net effect is a judicial amendment to the EPA, excerpting the unequivocal individual job concept.

The Secretary's justification thereof rested upon the inapposite case of *Hodgson* v. *First Federal Savings & Loan Assn.*, 455 F. 2d 818 (5th Cir. 1972) where the employer was charged with a violation of the Age Discrimination In Employment Act.[19] One of the two issues therein was whether the scope of injunctive relief should include all of the employer's available job descriptions or just the job of "teller". The record was studded with proof of company-wide discrimination in favor of youth and against age *in all available jobs*. There was also some indication of sex discrimination.

There is a marked contrast between the record in *First Federal Savings & Loan* and the subject case. In the initial *Fields* opinion (November 16, 1973), the Fifth Circuit found that:

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[19] 29 U.S.C., §621, *et seq.* The Age Discrimination Act does not include either the "establishment" or individual job criteria of the EPA.

> There was no proof of discrimination in classes of employees other than Area Supervisors, and accordingly we direct that the terms of the injunction be modified to limit its applicability to this class of employees.

This comports with the record which no more supports injunctive relief against the entire chain of stores (now more than sixty-six), than it does with respect to commission salesmen, stockboys, cashiers, janitors, security guards, warehousemen, truck drivers, office clerks or merchandise buyers.

The unwarranted inclusion of these job categories within the scope of the injunctive relief elevates "administrative necessity" to the status of legislation at the expense of the fundamental right to substantive and procedural due process.

4. Irreparable Damage to Fields and All Other Retail Chain Organizations.

Because of the Fifth Circuit's opinion, Fields and other multi-establishment national employers, such as Sears-Roebuck Co., F. W. Woolworth, J. C. Penney Co. and Montgomery Ward, are now confronted with the certainty of being unable to defend on a job-by-job, establishment by establishment, basis against future charges of EPA violations. In practical terms, Fields was found to have violated the Act as to *all* employee job classifications even though no evidence was before the Court as to the nature of these jobs; thus, a future case involving cashiers or office clerks would not be defensible on grounds peculiar to those jobs. It bears repeating that the Fifth Circuit did not find anything in the record to support such a result. Moreover,

the express language of the EPA does not sanction anything other than a case-by-case analysis of the various jobs, as was explained in *Golden Isles (supra).*

We know from *Hodgson* v. *Robert Hall Clothes, Inc., supra* (footnote 17), that Congress intended that pay differentials could be lawfully justified by any factor other than sex, even though the jobs involved the same skill, effort and responsibility. *Id.,* at 595 (i.e., a particular job produces more revenue). Fields has been deprived of the opportunity to prove, as may be necessary in the future, that cashiers, office clerks, salesmen, and other employees perform jobs *inter se* that demand different pay for males and females due to a factor other than sex.

The inclusion of all jobs and all stores within the injunction makes all future violations wilful *per se,* and compels criminal penalties as a natural consequence.

There is no justification in the history of the Act or in its judicial interpretation for the translation of isolated violations affecting one-job category at three of sixty-six establishments into a presumption of such violations affecting all jobs in all of those establishments.

B. *The Opinion Finding That the Secretary Had Sustained His Burden of Proof as to Equal Skill, But Remanding the Case to the District Court for Additional Findings as to Equal Effort and Responsibility, Is in Direct Conflict on the Question of Burden of Proof With* Schultz v. Wheaton Glass Co., *421 F.2d 259 (3rd Cir. 1970)*; Schultz v. American Can Co., *424 F.2d 356 (8th Cir. 1970)*; *and* Hodgson v. Corning Glass Works, *474 F.2d 226 (2nd Cir. 1973).*

1. The Court of Appeals Actually Found That the Secretary Had Not Demonstrated Substantial Equality.

The above-cited cases hold that the Secretary has the burden of demonstrating "substantial equality" in skill, effort and responsibility as a condition precedent to a showing of substantial job equality. Substantial job equality, in turn, is a condition precedent to establishing a violation of the Act. Violation of the Act is a condition precedent to an injunction.

The Court of Appeals announced its agreement therewith (A. 10a), but as aforementioned (*supra*, p. 10) failed to follow through. Instead, the Court allowed the injunction to stand, thus necessarily finding that the Secretary had carried the burden, but remanded for further factual proofs on the question of effort and responsibility, thereby necessarily finding that the Secretary had not carried the burden.

This is more than a mere internal inconsistency. For, if as here, the Secretary has not demonstrated substantial equality in each requisite element (skill, effort and responsibility) it was a literal impossibility to hold, as the Court nonetheless did, that the jobs were substantially equal. Thus, said holding was unwarranted—judged not by counsel's ingenuity, but by the opinion of the Court itself—and it inexorably follows that the injunction was and is im-

proper as resting upon differences in wage scales not proved violative of the act.

Accordingly, the Court's opinion is in direct conflict with *Wheaton Glass Co., American Can Co.* and *Corning Glass Works* (*supra*).

2. The Court of Appeals Impermissibly Relieves the Secretary of the Burden of Demonstrating Substantial Equality and Imposes Upon the Employer the Burden of Demonstrating the Absence Thereof.

The Court's decision permits the injunction to stand, although, by virtue of the remand as to effort and responsibility, it must be that the Secretary failed to demonstrate substantial equality between the jobs. Thus, the necessary predicate to support an injunction is missing. The result is that there has been judicially engrafted onto the Act the proviso that the employer has the burden of demonstrating an absence of substantial equality; that the employer's failure to so demonstrate, even though the Secretary has not shown the presence thereof, warrants an injunction.

Such result is in patent disagreement with the concept of "innocent until proven guilty", is violative of basic due process guarantees, and cannot be reconciled with *Wheaton Glass Co., American Can Co.* and *Corning Glass Works* (*supra*).

II.

The Fifth Circuit's *per Se* Approach to Violations and Broad Injunctive Relief Against Multi-Establishment Employers Under the Equal Pay Act Determines an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by the Supreme Court.

A. *Introduction—The Issue Defined.*

The question of when and whether chain-wide injunctive relief is appropriate for enforcement of the EPA *vis-a-vis* a multi-facility employer should be determined by proof of actual violations, or by proof of a centrally administered policy which fosters or condones wage discrimination affecting all or substantially all job classifications and establishments.

A lesser standard would vitiate the unique "establishment" and individual job criteria as available defenses in the EPA.

Nevertheless, the Fifth Circuit has applied a lesser standard, thus vitiating the establishment and job criteria prerequisites, by relying upon the standards for injunctive relief heretofore granted under traditional FLSA coverage. Even then, it has bypassed its own guidelines for determining the need for broad injunctive relief,[20] and adopted instead the rule allowing a harsh remedy when *justified* by the circumstances of cases involving *wanton* traditional coverage violations.[21] Clearly the latter rule does not

[20] *Wirtz* v. *Atlas Roofing Manufacturing Co.*, 377 F.2d 112, 116 (5th Cir. 1967); *Mitchell* v. *Ballenger Paving Co.*, 299 F.2d 297 (5th Cir. 1962), cert. denied, 370 U. S. 922 (1962).

[21] *Goldberg* v. *Cockrell d/b/a Cockrell Banana Co.*, 303 F.2d 811 (5th Cir. 1962); *Mitchell* v. *Pidcock d/b/a Pidcock Tobacco Warehouses*, 299 F.2d 281 (5th Cir. 1962).

apply here since the Court did not find that Fields violated the Act at any but three of its then sixty-six stores, or that its policy was one that fostered or condoned unlawful discrimination in wages on account of sex.

We ask, as did the Fifth Circuit of the trial court, where in the opinion (or in the record) is there a factual finding of unlawful wage *policies* or of a centrally administered company-wide policy that fostered unlawful discrimination? There is no such finding. The opinion concedes that Fields diligently attempted to enforce compliance with the EPA, and the Court could not have concluded otherwise in view of the unrebutted proof that Fields instructed and enforced compliance with the EPA.[22]

B. *Misapplication of, and Inappropriate Reliance Upon, Jiffy June Farms.*[23]

In the absence of a finding of wrongful intent or a policy to discriminate, the Circuit Court necessarily had to predicate its finding of wilfulness upon some other ground. The Court seized upon the maxim of *Jiffy June Farms*—i.e.,

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[22] On May 18, 1964, Fields/Industrial Relations Division advised the store management that the EPA would become effective the next month (Defendant's Exhibit 11, A. 50a). On March 25, 1966, the Division again advised store managers not to hire male and female employees at dissimilar rates on the basis of sex. (Defendant's Exhibit 12, A. 51a). On April 25, 1968, the Division again advised store managers and others that persons "performing work requiring the same degree of skill and knowledge" should receive the same compensation (Defendant's Exhibit 17, A. 52a to 53a).

[23] *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1970) wherein the Fifth Circuit held:

> "Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?" *Id.*, at 1142.

to know the law and breach it, albeit inadvertently, is sufficient basis to support a finding of wilfulness.[24]

The *Jiffy June Farms* test of wilfulness must be read in conjunction with the Portal-to-Portal Act of 1947, 29 U.S. C.A., §255(a) which provides for a basic two-year statute:

> " . . . except that a cause of action arising out of a wilful violation may be commenced within three years after the cause of action accrued."

Jiffy June Farms emasculates the statutory distinction between wilful and non-wilful violations because, under its rule, every violation must be wilful and hence, subject to the three-year statute of limitations. This, because every employer subject to the Act presumably knows the "FLSA is in the picture."

Accordingly, unless the Congressional distinction between "wilful" and "non-wilful" is to be ignored, as *Jiffy June Farms* does, wilfulness must turn on intent. Intent is the essential element distinguishing the two types of violations.

Herein, at the District Court and the Court of Appeals level, no finding was made of a discriminatory *policy;* to the contrary, it was affirmatively demonstrated that Fields tried to bring itself into compliance. Absent such a policy, and in the face of proof positive that the isolated violations were, at worst, the result of negligence or poor judgment—but not wrongful motive—no basis existed to impugn Fields' intent.

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[24] In *Brennan* v. *General Motors Acceptance Corp.*, 482 F. 2d 825, 828 (5th Cir. 1973) the Fifth Circuit recognized that *Jiffy June's* holding on wilfulness was limited to the facts of that case, but found that GMAC had adopted a course of action which it knew could result in overtime violations.

In short, the Fifth Circuit did not find, nor could it have found, an intent to violate the EPA. Therefore, the alleged violations could not possibly have been wilful.

Jiffy June Farms, to the extent it abrogates the statutory distinction, should be disavowed.

C. *Application of Jiffy June Farms Has Materially Prejudiced Fields, and Will Similarly Prejudice All Other Retail Chains, by Impermissibly Infringing Upon Basic Due Process Guarantees.*

1. Deprivation of the Two-Year Statute of Limitations.

Application of the maxim complained of materially prejudices Fields, and the entire chain store industry, by depriving it of the two-year statute of limitations without *any* showing whatever of the requisite intent.

2. Summarily Subject to Contempt Sanctions.

There is, however, an even more severe hazard resulting from the Court's opinion that hangs like the Damocles' sword over Fields and the entire industry. The danger is pointed up in *Hodgson* v. *Corning Glass Works, supra.* The Second Circuit there recognized the employer's sincere but ineffective efforts to bring itself into compliance, and held that the absence of widespread violations of the Act precluded the type of broad (chain wide) injunction imposed here. The Court reasoned that such an injunction would "put *Corning* under threat of contempt for any alleged violation of the Equal Pay Act" with respect to all its employment classifications in all but one of its twenty-six plants. *Id.,* at 236.

The history of judicial enforcement of the FLSA does not necessitate or mandate the result reached by the Fifth Circuit but avoided in *Corning Glass.* The purposes of the

EPA are not penal in the first instance. Injunctions rendered for its enforcement are supposed to be remedial, not punitive. *McComb* v. *Jacksonville Paper Company,* 336 U.S. 187, 193 (1949); and *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633 (1953) in which this Court observed:

> "The purpose of an injunction is to prevent future violations . . . [and] . . . the moving party must satisfy the court that relief is needed . . . [because] . . . there exists some cognizable danger of recurrent violation, something more than the mere possibility of a future violation."

Although injunctive relief is characterized as remedial and not punitive, evidence of a pre-existing injunction is evidence of wilfulness. *Home News Publishing Co.* v. *United States,* 329 F. 2d 191 (5th Cir. 1964).

Because the within injunction is chain-wide a first violation in any store within the classification of Area Supervisor, and not merely in the three establishments involved, *ipso facto* makes out a case of wilfulness as being in contravention of the injunction, with attendant contempt sanctions. Furthermore, because the injunction covers *all* job classifications, a first violation in any store and in any classification, perceptively broadens the chance of *per se* wilfulness as being in contravention of the injunction, with attendant contempt sanctions.

Thus, the holding that Fields was guilty of a *per se* wilful violation, and thereby subject to a chain-wide injunction for a first violation, becomes the inexorable link to a criminal prosecution and possible civil contempt despite the "establishment" and individual job concepts of the EPA. The FLSA will impose a $10,000 fine on Fields and

its agents for a second violation,[25] and a civil contempt would lie upon a mere charge of a subsequent equal pay violation at any of its stores affecting any employee job classification. In *Hodgson* v. *Hotard,* 436 F.2d 1110, 1115 (5th Cir. 1971), the Court recognized that the employer charged with civil contempt has a "heavy burden" of showing that he cannot meet the demands of the Court which imposed the injunction.

These unfortunate results, necessitated by the Fifth Circuit's opinion, is manifestly without the contemplation of the EPA especially when, as here, the Secretary has neither contended nor proved that, in any of the now more than sixty-six stores, persons employed as commission salesmen, stockboys, cashiers, janitors, security guards, warehousemen, truck drivers, office clerks, merchandise buyers, or any other classifications, have been discriminated against in rates of pay within and/or between their job classifications.

We believe the Second Circuit's reasoning in *Corning Glass* (*supra*), with which the Fifth Circuit is at odds, to be eminently proper. It represents a positive balance between the legislative goal and the basic due process Fifth Amendment Rights absolutely precluding the type of "guilty until proven innocent" approach regretfully adopted by the Fifth Circuit.

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[25] Section 16(a) of the FLSA provides:

"Any person who *willfully* violates any of the provisions of Section 15 shall upon conviction thereof be subject to a fine of not more than $10,000 or to imprisonment for not more than six months, or both [sic]. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection." (Emphasis supplied).

D. *The "Administrative Necessity" Test Is Not Warranted by the Within Circumstances and Unconstitutionally Prevents Fields, as It Will Likewise Prevent Other Chain Store Retailers, From Defending Against Future Alleged Violations.*

It bears repeating that no finding was made of a policy of discrimination; that Fields endeavored to comply; that isolated violations were alleged and proved in only three establishments, in a single job classification; that the assumption of requisite central control is without foundation in the record; and that, even if there were sufficient central control, it would be of no moment unless there also were a policy of discrimination.

Nonetheless, the Fifth Circuit maintained that the chain-wide injunctive relief embracing every job category and classification was justified because "considerations of administrative necessity are persuasive as warranting the chain-wide injunction . . . " (A. 17a) Congress did not write considerations of "administrative necessity" into the EPA. In fact, the Fifth Circuit has so found in *Hodgson* v. *Golden Isles Nursing Home, Inc.* (*supra*), wherein it rejected the Secretary's request for a conclusive determination that in all hospitals and nursing homes across the country, aides and orderlies perform equal work.

Assuming, *arguendo,* "administrative necessity" be an appropriate consideration, the fact remains that said factor can duly come into play only *after* a showing is made, as was not done here, that the violations are not isolated but widespread and the result not of negligence but of an intentional policy of discrimination, centrally administered.

CONCLUSION

The writ should be granted.

Respectfully submitted, this 5th day of March, 1974.

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Certificate of Service

I hereby certify that a copy hereof has been furnished to the Office of the Solicitor, United States Department of Labor, Room 441, Main Labor, 14th and Constitution Avenues, N. W., Washington, D. C., by mail, this 5th day of March, 1974.

WARREN J. KAPS
Attorney

Judgment of the U. S. Court of Appeals, Fifth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1973

No. 72-1066

D. C. Docket No. 68-104

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellee-Cross-Appellant,

versus

J. M. FIELDS, INC.,

Defendant-Appellant-Cross Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

Before:

TUTTLE, WISDOM and SIMPSON,
Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

Judgment of the U. S. Court of Appeals, Fifth Circuit

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court as modified in part in this cause be, and the same is hereby affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court for further consideration in accordance with the opinion of this Court:

It is further ordered that costs of the main appeal and cross appeal be equally taxed to the respective parties.

November 16, 1973

Issued as Mandate:

Opinion of the U. S. Court of Appeals,
Fifth Circuit

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1066

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee-
Cross Appellant,

versus

J. M. FIELDS, INC.,
Defendant-Appellant-
Cross Appellee.

Appeals from the United States District Court for the Middle District of Florida

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(November 16, 1973)

Before TUTTLE, WISDOM and SIMPSON,
Circuit Judges.

SIMPSON, Circuit Judge: We review on this appeal the decision below in a case arising under the Equal Pay provisions[1] of the Fair Labor Standards Act

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[1] 29 U.S.C., §206(d).

(FLSA), Title 29, U.S.C., §201 et seq. The district court found that the appellant, J. M. Fields, Inc. (Fields) had discriminated on the basis of sex in the payment of wages to supervisory personnel in three of the sixty-odd Fields' retail outlets. The court ordered payment to named employees of the minimum wages and overtime due them under the provisions of the Equal Pay Act (EPA or the Act).[2] The court also enjoined further violations of the Equal Pay Act "... in any of [Fields'] stores now in operation or hereafter operated by it." Fields as appellant and the Secretary of Labor (the Secretary) as cross-appellant each appeal from portions of the lower court's order.

I. *BACKGROUND: THE FIELDS ORGANIZATION*

A. *The National Organization*

Fields, a subsidiary of Food Fair Stores, Inc., is a chain-store enterprise operating more than sixty retail outlets in eleven states on the Eastern Seaboard of the United States. Fields' home offices are in New York City and Philadelphia, Pa. Its territory is divided into three regions for purposes of personnel administration. Each region is headed by a director who oversees the personnel files of employees in his area. The Fields' Industrial Relations Department in New York maintains all personnel files. Initial hiring of personnel and setting of salary rates for each of the individual

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[2]Under the provisions of 29 U.S.C., §206(d)(3) amounts owing to employees as a result of violations of the Equal Pay Act are denominated "unpaid minimum wages or unpaid overtime compensation."

Fields' stores is conducted either by the regional personnel director or by a representative of the New York office. In addition, the New York office issues periodic directives detailing salary ranges appropriate for different geographical areas and classes of employees. Finally, all wage increases are subject to approval either by the regional personnel director or by the New York office.

B. *The Local Retail Outlets*

The individual Fields stores are each headed by a Store Manager and two Assistant Store Managers. Each of the departments within the store is headed by an Area Supervisor (also referred to as a Department Manager). Fields follows what is apparently an industry-wide practice of dividing its departments into two categories — softline goods and hardline goods. In softlines are included clothing and infant accessories (cribs, furniture, mattresses). The hardline departments contain all the other goods sold by Fields (housewares, cosmetics, automobile accessories and numerous other lines).

The function of the Area Supervisors in the hardline and softline departments is roughly similar, save in the matter of ordering replenishment stocks. The basic re-ordering of most softline goods is handled by a computer which is fed pre-punched portions of sales tickets removed by cashiers when the items are purchased. Re-ordering of hardline goods is based, for the most part, upon physical counts of merchandise on hand. The Area Supervisors in the hardline depart-

ments are responsible for these counts. Managers in both hardline and softline departments must be cognizant of fast-moving items and reorder accordingly.

II. *THE COMPLAINT*

On June 14, 1968, the Secretary filed a complaint alleging that Fields had violated and was continuing in violation of Sections 6(d) and 15(a)(2) of the Fair Labor Standards Act[3] in at least three of its retail outlets in Florida — those in Eau Gallie, Merritts Island, and Tallahassee. The Secretary's allegations were substantially as follows: (1) that male softline Area Supervisors were generally paid more than their female counterparts; (2) that male hardline Area Supervisors generally were paid more than their female

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[3]Section 6(d) of the FLSA, Title 29, U.S.C., §206(d), provides, in pertinent part:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, * * *.

Section 15(a)(2) of the FLSA, Title 29, U.S.C., §215(a)(2), provides in pertinent part:

> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person —
>
> (2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title; * * *.

counterparts; (3) that softline Area Supervisors were generally female; (4) that the softline Area Supervisors were generally paid less than the hardline Area Supervisors; (5) that there was no basis for a distinction between hardline and softline Area Supervisors for the purposes of the Equal Pay Act. The Secretary further alleged that Fields had had knowledge of the provisions of the Equal Pay Act during the entire period of the violations, and, therefore, that the violations were wilful violations for the purposes of the Portal-to-Portal Act, Title 29, U.S.C., §255(a); and that this had the effect of exposing Fields to possible liability for the payment of minimum wages and overtime for a three year (rather than a two year period in the case of non-wilful violations) period prior to commencement of the Secretary's suit.

Fields' answer asserted that it had not wilfully violated the Act in that it had not intended to discriminate among its Area Supervisors according to sex. Fields alleged that it had hired its Supervisors at the going market rate and that compensation had been based solely on the going market rate and not upon sex. Fields further answered that there was a basis for differentiation between the hardline and softline managers based on the skill and responsibility required of these respective positions. Particular reference was made in this respect to the different methods of ordering goods prevailing in the two types of departments, hardline and softline.

III. *THE OPINION BELOW*

This district court entered findings of fact and conclusions of law supporting in the main the Secretary's position. The court found the existence of discrimination based upon sex in some particulars in each of the three Fields stores involved.[4] The court also found that the duties of Area Supervisor in the hardline and softline departments differed so substantially in terms of skill and responsibility as to require their being considered unequal for the purposes of the Equal Pay Act.[5] The court concluded as a matter of law that the discriminations in wages between sexes constituted violations of the Equal Pay Act.[6] The court concluded further that the discriminations were unintentional and therefore not wilful for the purposes of the Portal-to-Portal Act, Title 29, U.S.C. §255(a).[7]

The district court judgment required Fields to refrain from withholding minimum wages and overtime compensation from the employees found to have been the object of violations of the Act, and further enjoined Fields from committing violations of the Act ". . . in any of its stores now in operation and hereafter operated by it." Both parties appeal from the findings, conclusions and judgment. We now consider the issues raised on appeal.

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[4]*Hodgson v. J. M. Fields*, M.D. Fla. 1971, 335 F.Supp. 731, 732-33, Findings of Fact Nos. 10-20.
[5]Id. Findings of Fact Nos. 8, 9, and 22.
[6]Id. at 733, Conclusion of Law No. 2.
[7]Id. Conclusion of Law No. 4.

PETER J. BRENNAN v. J. M. FIELDS, INC.

IV. *THE HARDLINE/SOFTLINE DISTINCTION*

The district court found that there existed a distinction between the jobs of hardline Area Supervisor and softline Area Supervisor such that the two could not be compared for purposes of the Equal Pay Act.[•] This finding was undergirded by Findings of Fact Nos. 8 and 9:

> 8. The method of ordering in the hardline departments imposes on those Area Supervisors an *added responsibility* which required a *substantial portion of* their *working time.*[2] [Footnote 2 read: "Witness Peggy Smith, a Tallahassee hardlines supervisor testified that she spent four hours a day working on the preprint books."]
>
> 9. The *skill and responsibility* required of hardline managers is substantially greater than that required of softline managers.[•] • • [Emphasis added].

Fields urges on appeal that we not only adopt the district court's findings of the existence of a distinction between hardline and softline managers, but also that we expand the scope of the softlines category to include "curtains and domestics." On cross appeal, the Secretary urges that the distinctions between hardline and softline managers' jobs are so minimal as to require their being considered equal for the purposes of the Equal Pay Act.

[•]Id. Finding of Fact No. 22.

We begin by noting that the Findings of Fact numbered 8 and 9, and 22 are so conclusory in nature as to preclude the necessity of our applying the "clearly erroneous" standard of Rule 52(a), F.R.Civ.P., on review. *Baumgartner v. United States*, 1944, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525; *Shultz v. Wheaton Glass Co.*, 3 Cir. 1970, 421 F.2d 259, 267. In this situation we are required to consider only whether the findings are correct in the light of the provisions of the Equal Pay Act, the regulations thereunder, and prior decisions.

The Equal Pay Act mandates equal pay for jobs "the performance of which requires equal *skill, effort, and responsibility*, and which are performed under *similar working conditions* . . ." * * * (E.P.A., Title 29, U.S.C., §206(d) (1). Emphasis added). The Regulations promulgated by the Department of Labor, 29 C.F.R. §800.0 et seq., provide that: "The terms" [skill, effort, and responsibility] "are considered to constitute three separate tests, each of which must be met in order for the equal pay standards to apply." (29 C.F.R. §800.122).

We noted in *Hodgson v. Brookhaven General Hospital*, 5 Cir. 1970, 436 F.2d 719, 722, that the Secretary of Labor has the burden of proving "equality of work and inequality of pay." In meeting this burden, the Secretary is, however, required only to show that the jobs under consideration are "substantially equal," *Hodgson v. Fairmont Supply Co.*, 4 Cir. 1972, 454 F.2d 490, 493. We think the Secretary met his burden in the instant case. He showed that the Area Supervisors in both hardline and softline departments were respon-

sible for ordering merchandise, for assisting customers with their purchases, and for maintaining orderly and properly displayed racks of merchandise in their respective departments. This showed that the jobs were "substantially equal."

The principal factor involved in the district court's decision that the hardline and softline managers' jobs were unequal was the different method of ordering replacement merchandise prevailing in the two types of departments. Considered in the light of the tripartite test of substantial job equality, it cannot be said that the two methods differed in terms of skill involved. The record is unsatisfactory as to the existence of a possible ground for sustaining a blanket distinction between hardlines and softlines based on either effort or responsibility.

The regulations promulgated by the Department of Labor under the E.P.A. state that "skill includes consideration of such factors as experience, training, education, and ability. . ." 29 C.F.R. §800.125. The evidence indicates no additional requirements for the position of hardline manager based on any of these factors. Indeed, the evidence as to training was precisely to the contrary: the softline managers received more extensive training in terms of time spent in the training program. Thus, we overturn the finding by the district court that the job of hardline manager required more skill than that of softline manager. Such a finding is without support in this record.

Because the findings of fact permit no conclusion on our part as to the elements of responsibility and effort involved in the different managerial positions, we remand for further findings on these two points. Our concern in this area of job equality between the two kinds of Area Supervisors is primarily with the sweeping nature of the district court's finding of job inequality and the meager support in the findings of fact for such a pronouncement. The district court found for example that the method of ordering in the hardline departments consumed a substantial portion of the working hours of the hardline managers. In support of this finding the court cited the fact that the manager of one of the hardline departments in one of the Fields' stores spent four hours a day reordering for her department.[9] This did not rebut the Secretary's proof of job equality, and does not support a finding that all hardline managers in all hardline departments spend an equal amount of time in reordering merchandise. Requisite to such a finding is proof that this single hardline Area Supervisor's experience typifies the requirements of the job of hardline manager; that the housewares manager, the garden shop manager, the automotive manager, and all the other hardline managers are required to exert this effort in order to maintain their stocks — and further, that the softline managers are not similarly required to spend this amount of time checking the stock in their departments. Any lesser amount of proof would not support the broad distinction found by the district court to exist between the two positions. Accordingly, we remand the case to the district court for further find-

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[9]Finding of Fact No. 8 and Note 2 thereto, text, supra.

ings as to the comparative degrees of effort and responsibility required in the supervision of hardline and softline departments. We add the admonition that the company-wide practice of distinguishing between hardlines and softlines is no basis without more for a conclusion of the existence of requisite distinction for purposes of E.P.A. *Hodgson v. Golden Isles Convalescent Homes, Inc.*, 5 Cir. 1972, 468 F.2d 1256. The district court should explain its reasons for finding distinctions between hardline and softline in terms used in the Regulations. It is difficult if not impossible for us properly to evaluate district court findings and conclusions on review on any other basis.

V. *WILFUL OR NON-WILFUL VIOLATION?*

Ths district court decided as a matter of law that Fields' violations of the Equal Pay Act were not wilful for the purpose of the Portal-to-Portal Act's three-year statute of limitations on claims for minimum wages and overtime due. 29 U.S.C., §255(a). The determination was rather that the discrimination found was merely the unintended result of Fields' practice of hiring persons at whatever wage it could. The Secretary urges on cross-appeal that the district court's finding on the question of wilfulness is contrary to our holding in *Coleman v. Jiffy June Farms, Inc.*, 5 Cir. 1970, 458 F.2d 1139, 66 CCH Lab. Cas. ¶32,588, rendered some five months after the findings and conclusions were entered in the instant case.

In *Jiffy June Farms*, we considered a violation of the Fair Labor Standards Act occurring within the context of a collective bargaining agreement in which the employees had agreed to exempt themselves from

FLSA provisions in exchange for a raise in pay. The record there disclosed in addition that the employer had sought and secured advice of counsel that this arrangement would in fact exempt the employees from the FLSA. Judge Wisdom, speaking for the court, proposed the following as the test of wilfulness to be applied in cases concerned with civil liability for violations of the FLSA: "Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?" Id. at 1142. Judge Wisdom stated: "The entire legislative history of the 1966 amendments of the FLSA indicates a liberalizing intention on the part of Congress. Requiring employers to have more than awareness of the possible applicability of the FLSA would be inconsistent with that intent." Id.

In the instant case, the record discloses that Fields' central office sent memoranda to its district managers and store managers advising them of the implementation of the E.P.A., and of the requirements of the Act. In addition, Fields' regional personnel managers were under instructions to make periodic examinations of the personnel files of the Fields stores and to report any possible violations of the E.P.A. to the New York office. This was sufficient to establish that Fields knew "that the FLSA was in the picture." In defense of the district court finding Fields argues that the random pattern of wage discrimination together with the cessation of *per se* violations of the Act prior to trial indicates that the violations were negligent and not wilful. We apply the test as enunciated in *Jiffy June Farms*, supra, as the correct test. To allow exceptions for "random" discrimination or in situations where an employer, once charged with violating the Act, cor-

rects the unlawful practice, would sap much of the E.P.A.'s vitality. Such a construction would create unnecessary problems for future courts attempting to construe the Act. We determine that the district court erred in finding that Fields' violations were not wilful for the purposes of the Portal-to-Portal Act's three-year statute of limitations. We remand with directions to modify the judgment so as to allow employees overtime and minimum wages for a period of three years from the date that the cause of action accrued.

VI. *THE CHAIN-WIDE INJUNCTION*

The district court by its decree enjoined Fields from violating the provisions of the Equal Pay Act "in any of its stores now in operation and hereafter operated by it . . ." Fields here challenges the issuance of a chain-wide injunction on the facts of the instant case, and urges that the injunction be modified. In support of the district court's injunction the Secretary points out that the violations in the instant case occurred in the context of close centralized supervision over wage scales and pay policies in the individual stores, and urges that a chain-wide injunction was appropriate to restrain what had apparently been a company policy regarding hiring and setting of wage scales.

We start with the rubric that the granting of injunctive relief in FLSA suits is a matter within the sound discretion of the district judge. We will not overturn or modify an injunction in such suits without a showing of clear abuse of that discretion. In determining the existence vel non of an abuse of discretion it is

necessary to examine policies underlying the FLSA and the purposes served by injunctions in suits under the FLSA. *Wirtz v. Ocala Gas Co.*, 5 Cir. 1964, 336 F.2d 236, 240.

See *Goldberg v. Cockrell*, 5 Cir. 1962, 303 F.2d 811 814, where we considered the role of the injunction in the context of the FLSA:

> "Issuance of an injunction in cases such as these does not subject an employer to any penalty for his past violations of the law. It merely says: in the future do what the law requires you to do. The injunction shifts the responsibility for compliance onto the employer's shoulders. * * * The Wage and Hour Division cannot reasonably be charged with the responsibility of checking back on past violators to make sure that they are obeying the laws. Fairness and economy of administrative effort both dictate that after an employer has once violated the Act he should bear his own responsibility for the future."[10]

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[10]This approach was justified by this statement in the opinion:

> "* * * Unlike most statutes regulating conduct, the Fair Labor Standards Act does not carry any immediate sanction. In effect it gives each employer one free offense: on proof of violation he is liable at most for repayment of the wages that he originally should have paid his employees, to the extent that the unpaid wages can be proven. This rule may be justified on the basis of avoiding punishment of those who are ignorant of the law or do not believe that it applies to them; but no law can be effectively enforced if individuals are allowed to make repeated violations of it with impunity. One unexplained offense is enough." 303 F.2d at 814.

In *Wirtz v. Ocala Gas Co.*, supra, at 240, we noted further:

> "Inasmuch as [the injunctions] are a means of effecting general compliance with national policy expressed by Congress, they are to be utilized in the light of the purposes of the Act, in aid of the administrative efforts at enforcement, and not grudgingly."

See further our statement in *Hodgson v. First Federal Savings and Loan Ass'n.*, 5 Cir. 1972, 455 F.2d 818, 826, that "courts should not be loath to issue injunctions of general applicability." We review the context in which the injunction in the instant case issued in the light of these principles.

Fields, as stated, has more than sixty stores in its chain. Evidence introduced at trial indicated that Fields' hiring and wage policies were subject to centralized control of a significant degree. It was hardly an abuse of discretion in these circumstances for the district court to enjoin Fields as a corporate defendant rather than to enter a limited injunction against the individual stores found to be in violation of the Equal Pay Act. It would frustrate the broad purposes of the FLSA in suits involving large corporate defendants with extensive branch operations to require the Secretary to investigate and prove violations in all or substantially all of the defendant's branches to justify the issuance of a chain-wide injunction. Considerations of administrative necessity are persuasive as warranting the chain-wide injunction issues below. Again we quote *Wirtz v. Ocala Gas Co.*, supra, at 240:

> "These FLSA injunctions are not excessively burdensome as this Court has pointed out heretofore. They subject the defendants to no penalty or hardship. They require no more than that the defendant comply with the law. [Citation omitted] Their aim is remedial and not punitive.* * *"

We find that the issuance of a chain-wide injunction in this case was not an abuse of discretion, and affirm the district court on this point.

The language of the injunction was overly broad in this one respect: the district court framed its injunction in terms that apply not merely to the class of employees involved in the instant litigation, the Area Supervisors, but as well to all Fields' employees. There was no proof of discrimination in classes of employees other than Area Supervisors, and accordingly we direct that the terms of the injunction be modified to limit its applicability to this class of employees. The language contained in the injunction against further violations of the Equal Pay Act should be modified by substituting the term "Area Supervisor" for the term "employee(s)". Cf. *Hodgson v. Corning Glass Works*, 2 Cir. 1973, 474 F.2d 226.

AFFIRMED in part, REVERSED in part, MODIFIED in part, and REMANDED for further consideration.

U. S. Court of Appeals Modification on Rehearing

INDEXED

Peter J. BRENNAN, Secretary of Labor, United States Department of Labor, Plaintiff-Appellee-Cross Appellant,

v.

J. M. FIELDS, INC., Defendant-Appellant-Cross Appellee.

No. 72-1066.

United States Court of Appeals, Fifth Circuit.

Jan. 17, 1974.

Appeals from the United States District Court for the Middle District of Florida.

ON PETITIONS FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Nov. 16, 1973, 5 Cir., 1973, —— F.2d ——).

Before TUTTLE, WISDOM and SIMPSON, Circuit Judges.

PER CURIAM:

The motion of the Secretary of Labor to strike the last paragraph of the Court's opinion of November 16, 1973, is not passed upon.

The Secretary of Labor's alternative petition for rehearing is granted to the extent that the last paragraph of the body of the printed slip opinion, page 16, commencing with the words "The language of the injunction * * *" and ending with the words "* * * Cf. Hodgson v. Corning Glass Works, 2 Cir. 1973, 474 F.2d 226." is withdrawn in its entirety, and said petition is otherwise denied.

BRENNAN v. J. M. FIELDS, INC.

The petition for rehearing of J. M. Fields, Inc. is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc is denied.

Judgment of the U. S. District Court, Middle District of Florida

[Caption Omitted]

JUDGMENT

This cause came on for trial before this Court sitting without a jury on the 8th day of June 1970. The Court having considered the pleadings, the oral testimony and the exhibits, the arguments and briefs of counsel; and the Court having heretofore on June 24, 1971, entered its findings of fact and conclusions of law; and in accordance with such findings of fact and conclusions of law, it hereby is:

ORDERED, ADJUDGED and DECREED that the defendant, J. M. Fields, Inc., a corporation, its officers, agents, servants, employees, attorneys and all persons acting or claiming to act in its behalf and interest be, and they hereby are, PERMANENTLY ENJOINED from violating the equal pay provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201, *et seq.*], hereinafter referred to as the Act, in any of its stores now in operation and hereafter operated by it, in that they:

> SHALL NOT, contrary to sections 6(d) and 15(a)(2) of the Act [29 U.S.C. 206(d) and 215 (a)(2)], discriminate, within any of the defendant's stores, between employees on the basis of sex by paying wages to employees in any such store at a rate less than the rate at which they pay wages to employees of the opposite sex in such store for equal work on jobs the

performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions.

It is FURTHER ORDERED, ADJUDGED and DECREED that the defendant be, and it hereby is, restrained from withholding payment of minimum wages and overtime compensation found by the Court to be due defendant's employees, as a result of the defendant's wage discriminations on the basis of sex, for the periods of employment and in the amounts as set forth in Schedule "A" attached hereto and made a part hereof. It is

FURTHER ORDERED that within fifteen (15) days following entry of this Judgment, the defendant shall deliver to plaintiff's attorneys a cashier's or certified check payable to "Wage and Hour Division—Labor" in the total amount stated in Schedule "A" hereto, *less* deductions required by law as to each employee.

The defendant shall also provide plaintiff's attorneys with a schedule showing its employer identification numbers and the last-known address, social security number, gross amount, deductions and net amount as to each of the employees listed on Schedule "A" hereto.

Plaintiff shall distribute the proceeds of such check to said employees, or to their heir or heirs, and any money not so distributed within the period of three years, because of inability to locate the proper persons or because of their refusal to accept it, shall be covered

into the Treasury of the United States as miscellaneous receipts.

It is ORDERED that costs of this action be taxed to the defendant for which execution may issue.

DONE and ORDERED this 29th day of November, 1971.

/s/ GEORGE C. YOUNG
UNITED STATES DISTRICT JUDGE

[Filed Nov. 29, 1971]

Schedule "A" J. M. FIELDS, INC.

Employee	*Period From*		*To*	*Amount*
Tallahassee (Softlines):				
Elaine Hanna (Parrish)	10/ 1/66	-	1/31/69	$ 1,984.32
Eleanor Poston	6/14/66	-	1/31/69	2,590.56
Shelley Willis	7/ 1/67	-	1/31/69	1,542.84
		Total	-	$ 6,117.72
Tallahassee (Hardlines):				
Mary Finley (Eure)	11/ 4/67	-	3/ 4/68	$ 367.92
Lucy Howell (Taylor)	6/14/66	-	2/26/68	2,418.52
Kathrine Johnson	11/14/69	-	6/ 8/70	1,028.00
Audry Lowney	12/27/66	-	11/ 1/69	3,016.16
Daveen Screeton	3/ 4/68	-	6/ 8/70	1,781.72
Martha Skipper	4/22/68	-	6/ 8/70	1,657.00
Peggy Smith	8/ 1/66	-	9/10/69	3,008.28
Ola Mae Woodson	10/ 6/69	-	6/ 8/70	817.60
		Total	-	$14,095.20
	Total - Tallahassee		-	$20,212.92

Employee	Period From		To	Amount
Eau Gallie (Hardlines):				
Salome Burton	6/14/66	-	5/ 4/69	$ 1,413.94
Ruth Derry	6/14/66	-	5/ 4/69	2,738.40
Maxine Johnson	6/14/66	-	5/ 4/69	2,926.88
Lorraine Lunden	6/14/66	-	5/ 4/69	960.96
Ann Manning	6/14/66	-	5/ 4/69	2,005.84
		Total	-	$10,046.02
Merritt Island (Hardlines):				
Shirley Giannini	9/ 2/67	-	12/28/69	$ 1,224.20
Mildred Sutherland (Meyers)	6/14/66	-	11/22/66	379.08
		Total	-	$ 1,603.28
GRAND TOTAL - ALL STORES			-	$31,862.22

Findings of Fact and Conclusions of Law

This action was brought by the Secretary of Labor as plaintiff, against defendant, J. M. FIELDS, INC., seeking to enjoin alleged violations of the Fair Labor Standards Act of 1938, Title 29, United States Code, §§201 *et seq* and to restrain the defendant from withholding payment of back wages due employees under the Act.

The gist of the action is the claim that defendant in its Tallahassee, Eau Gallie and Merritt Island, Florida stores, since June 15, 1965 has discriminated in that class of employees known as "Area Supervisors"[1] on the basis of sex by paying women lower wages than men for work requiring equal skill, effort, and respons-

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[1]With the exception of those persons in charge of supervising the stock room and the major appliances departments which positions the Secretary does not challenge.

ibility, and performed under similar working conditions.

The Court, having heard the evidence and arguments of counsel and having considered the post trial briefs, makes the following Findings of Fact and Conclusions of Law and Order for Judgment herein:

FINDINGS OF FACT

1. The involved stores, operated by the defendant, are essentially self service discount retail establishments handling a broad range of merchandise.

2. During the period in question there existed in defendant's stores a job classification "Area Supervisor".

3. An Area Supervisor was responsible for the general management of one or more departments such as housewares, lamps, rugs, glassware, toys, sporting goods, radics, traffic appliances, health and beauty aids, garden shop, pets, domestics, drapes, bath shop, cameras, records, ladies' wear, notions, luggage, mens' wear, boys' wear, girls' wear, infants' wear. bras, panties, slips, hosiery, men's socks, ladies sportswear, handbags, and shoes.

4. The duties of an Area Supervisor in charge of one or more of these departments included, but were not limited to:

(a) Supervision of floor personnel.
(b) Customer assistance.
(c) Quality control of merchandise.
(d) Comparison shopping.
(e) Recommendations as to price mark downs on merchandise.
(f) Relief of the "front" supervisor during lunch and breaks.
(g) Recognition and ordering of "hot items" or items that were selling well.

5. In retail merchandising there are recognized two broad lines of goods; soft lines which are clothing, and hardlines which are all lines but clothing.

6. In the defendant's stores there existed in the softlines departments an automatic replenishment system whereby one-half of the sales ticket on the items sold was torn off and collected by the cashier and then sent to a central office from which replacement stock was ordered.

7. In the hardlines departments ordering was accomplished by means of "pre-print" books, which orders were initiated by the Area Supervisor on the basis of the inventory level.

8. The method of ordering in the hardline departments imposes on those Area Supervisors an added responsibility which required a substantial portion of their working time.[2]

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[2]Witness Peggy Smith, a Tallahassee hardlines supervisor testified that she spent four hours a day working on the pre-print books.

9. The skill and responsibility required of hardline managers is substantially greater than that required of softline managers.

10. From September 26, 1966 until February 1, 1969, men Area Supervisors of softline departments in defendant's Tallahassee store were paid an average of $.35 per hour more than women.[3]

11. There has been no wage discrimination on the basis of sex among Area Supervisors in charge of softline departments of the Tallahassee store since February 1, 1969.

12. From February 8, 1966 until August 15, 1969 (which is as far as the personnel records for men Area Supervisors in charge of hardlines at defendant's Tallahassee store are complete), men Area Supervisors of hardline departments in the Tallahassee store were paid an average of $ .45 per hour more than women. (Table "B").

13. As of August 15, 1969, men Area Supervisors in charge of hardlines at defendant's Tallahassee store were being paid an average of $ .35 per hour more than women. (Table "B").

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[3]This figure represents the approximate average hourly wage differential over the 28 months from September 26, 1966 to February 1, 1969, as compiled from table "A". Table "A" was prepared from the Tallahassee employees personal records (Plaintiff's Exhibit 3). This same method was used in compiling all wage discrepancies.

14. From June 15, 1965 until May 4, 1969, men Area Supervisors of hardline departments in defendant's Eau Gallie store were paid an average of $ .27 per hour more than women. (Table "C").

15. There has been no wage discrimination on the basis of sex among Area Supervisors in charge of hardline departments of the Eau Gallie store since May 4, 1969.

16. The evidence does not establish that women Area Supervisors of softline departments in defendant's Eau Gallie store were paid less than men.

17. From June 15, 1965 until her termination, November 22, 1966, Mildred Sutherland, for managing the hardline department of health and beauty aides, received $ .40 per hour less than men Area Supervisors of hardline departments in the Merritt Island store. (Table "D").

18. From May 8, 1967 until December 28, 1969, Shirley Giannia, for managing the hardline departments of domestics and drapes, received $ .20 per hour less than men Area Supervisors of hardline departments in the Merritt Island store. (Table "D").

19. There has been no wage discrimination on the basis of sex among Area Supervisors in charge of hardline departments in the Merritt Island store since December 28, 1969.

20. The evidence does not establish that women Area Supervisors of softline departments in defendant's Merritt Island store were paid less than men.

21. With regard to the wage discrepancies in findings 10, 12, 13, 14, 17 and 18, J. M. Fields, during the periods in question, hired and paid its employees at whatever rate it could get them, the overall result of which was to discriminate against women. (Although there were a few instances in which men employees were paid less than women, it is the overall effect with which the Court is concerned.)

22. The jobs of hardline and softline managers differ substantially so that they should not be compared for purposes of the Equal Pay Act.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and subject matter. Title 29, United States Code, §217.

2. Because the wage discrepancies in findings 10, 12, 13, 14, 17 and 18 were discriminations on the basis of sex, they constituted violations of the Equal Pay Act.

3. The violation of the Equal Pay Act in the hardline departments of defendant's Tallahassee store were continuing as of August 15, 1969, the last date for which personnel records sufficient to determine a violation were available.

4. The violations were and are not willful. Although, as noted in finding 21, the defendant's hiring practice

had the overall effect of discrimination in some lines against women, that was a result and not an intentional purpose of defendant in its employment practices. Therefore, the two year statute of limitations is applicable, and actions for any wage discriminations prior to June 14, 1966 are barred. Title 29, United States Code, §255(a).

5. The plaintiff is entitled to an injunction, enjoining defendant from future wage discrimination on the basis of sex in any of its stores.

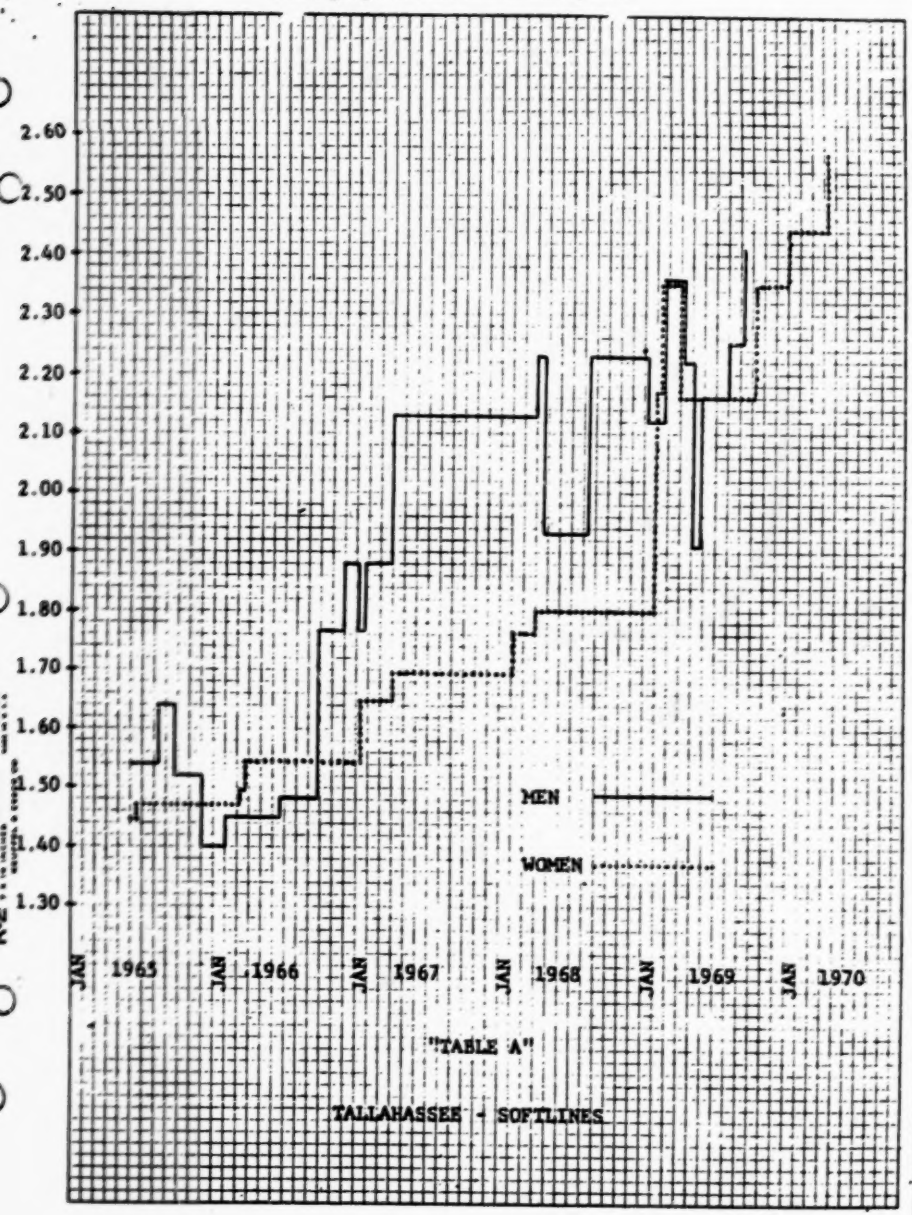
6. Each female employee whose pay was less than the average paid to men during the periods of wage discrimination covered in findings 10, 12, 13, 14, 17 and 18, subsequent to June 14, 1966, are entitled to payment from the defendant of the difference between such average men's pay and the wage actually paid such female employee.

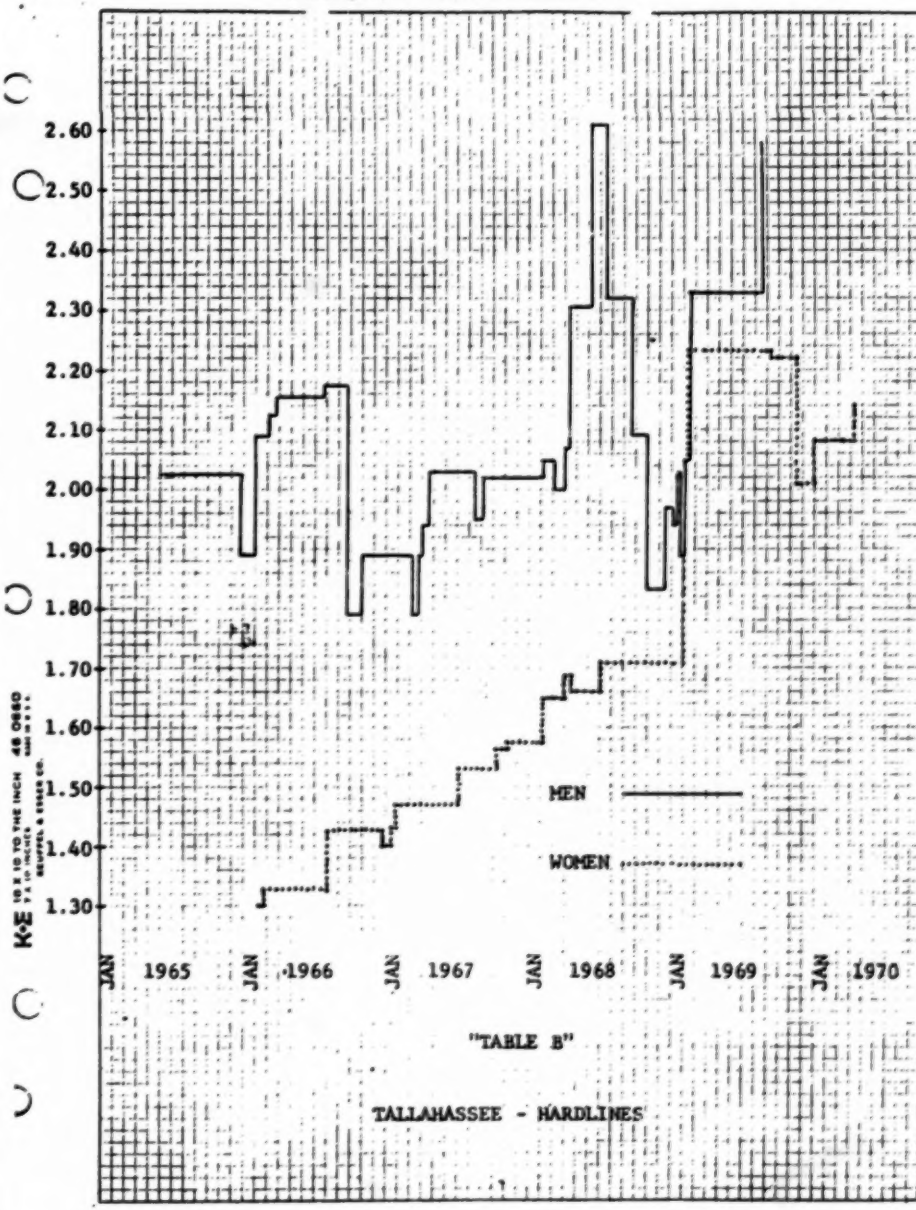
Counsel for plaintiff shall prepare, within thirty (30) days from date hereof, a proposed judgment in accordance with the foregoing. The average men's pay to be used in computing the unpaid wages due to each individual female employee is the average designated by the solid lines on the applicable one of the tables attached hereto.

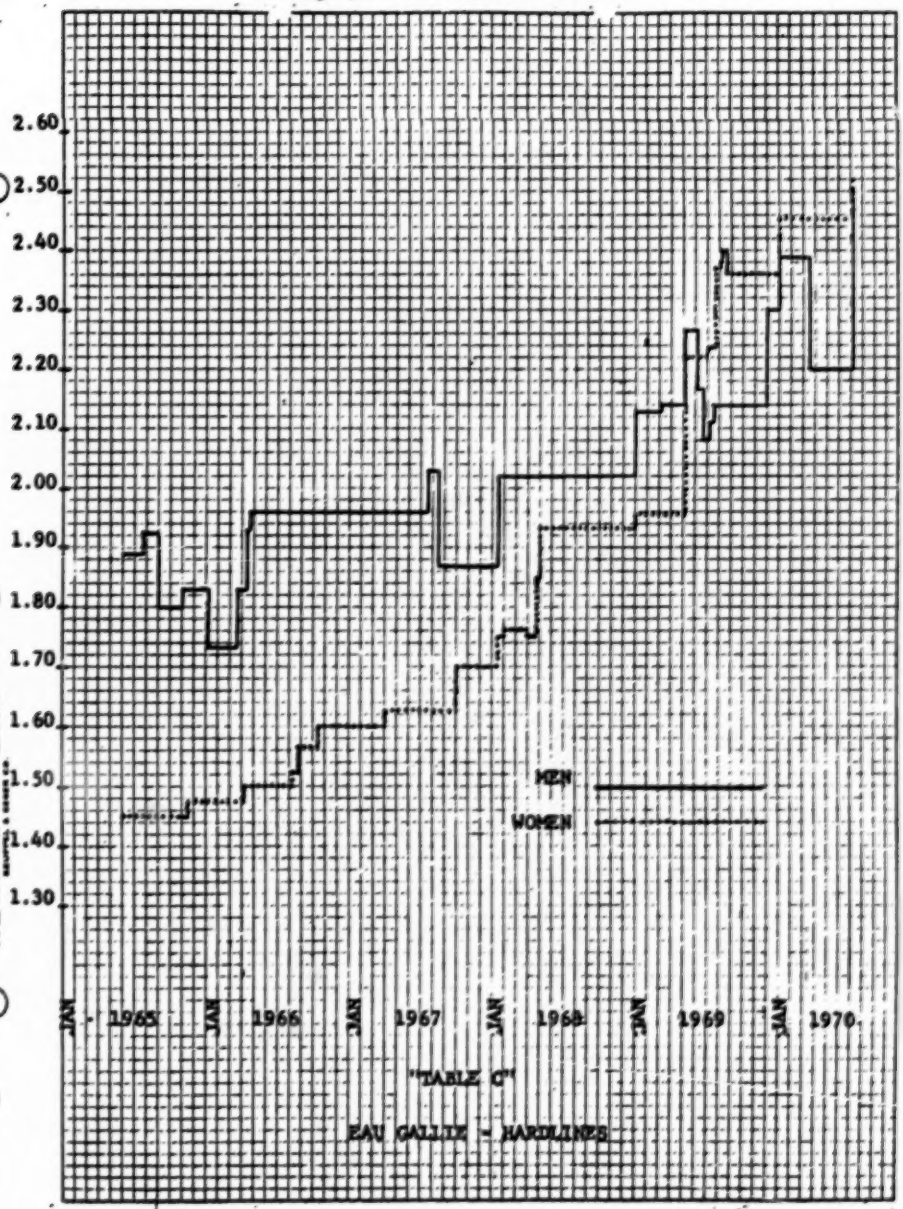
DATED at Orlando, Florida, this 24th day of June, 1971.

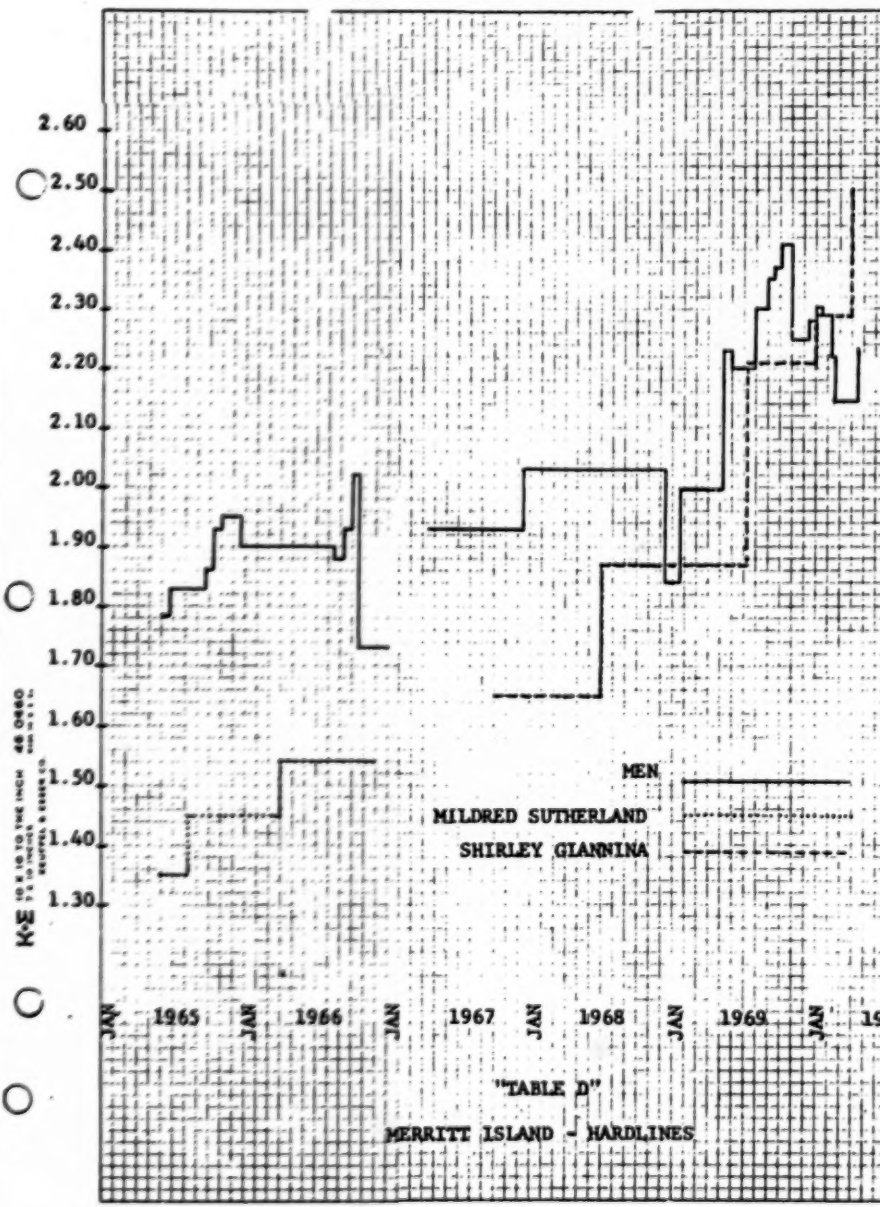
/s/ GEORGE C. YOUNG
United States District Judge

[Filed June 24, 1971]


2.60
2.50
2.40
2.30
2.20
2.10
2.00
1.90
1.80
1.70
1.60
1.50
1.40
1.30
MEN
WOMEN
JAN 1965
JAN 1966
JAN 1967
JAN 1968
JAN 1969
JAN 1970
"TABLE A"
TALLAHASSEE - SOFTLINES


2.60
2.50
2.40
2.30
2.20
2.10
2.00
1.90
1.80
1.70
1.60
1.50
1.40
1.30
JAN 1965
JAN 1966
JAN 1967
JAN 1968
JAN 1969
JAN 1970
MEN
WOMEN
"TABLE B"
TALLAHASSEE - HARDLINES


2.60
2.50
2.40
2.30
2.20
2.10
2.00
1.90
1.80
1.70
1.60
1.50
1.40
1.30
MEN
WOMEN
JAN 1965
JAN 1966
JAN 1967
JAN 1968
JAN 1969
JAN 1970
"TABLE C"
EAU GALLIE - HARDLINES


2.60
2.50
2.40
2.30
2.20
2.10
2.00
1.90
1.80
1.70
1.60
1.50
1.40
1.30
K-E
MEN
MILDRED SUTHERLAND
SHIRLEY GIANNINA
JAN 1965
JAN 1966
JAN 1967
JAN 1968
JAN 1969
"TABLE D"
MERRITT ISLAND - HARDLINES

Excerpts From the Minutes

Testimony of Ray C. Simmons

[455] Q During your tenure, has the company had any policies with regard to personnel or the administration?

A Oh, absolutely.

Q During your tenure, has there been a company policy with respect to hiring employees at the store level at Eau Gallie, Tallahassee, Merritt Island?

A Yes, sir.

Q Do you know what the policy is?

A The hiring of employees or department managers or what?

Q Let's talk — since the case involves department managers, is there — do you know what the policy is with respect to department managers at those three stores?

A Yes, sir, the store manager is responsible for recruiting, interviewing, selecting and hiring his own department managers.

Q Is this a companywide policy or is this a policy that just applied to the three stores in this case?

A This is companywide policy.

Q Has the policy been the same or different or has it changed since June of 1965?

[456] A The policy has been the same. There is one exception that I might relate. When we open a new store, it is my responsibility at that time to go into the area and assist the store manager in the recruitment and selection of all of the people, because it would be such a burden on him to do it himself in a short period of time.

Q Does the policy on hiring department managers include consideration of what factors go into hiring?

Richard Mars?

A Yes.

Q Was Richard Mars an area supervisor?

A Richard Mars was a department manager and stock control manager.

Q Did you ever call Mr. Mars an area supervisor?

A No; not to the best of my recollection.

Q Was the term, area supervisor, not used in Tallahassee at all?

A It might; I never used it.

Q As part, do you have any duty with respect to hiring people to work?

A Yes.

Q Do you hire department managers?

A Yes.

Q When you hire department managers at your store how do you decide what to pay them, or what to offer them?

A Job involvement; they are, they are experienced, their background and what the labor market would call for.

Q Do you have any instructions from your company concerning how much to pay or what not to pay?

A We had a few years ago; yes.

Q When you hire a person to be a department manager do you have any qualifications that you look for in a [717] person for a job?

A Yes.

Q What do you look for; what do you consider?

A Well, look at their experience, have they worked in other retail outlets; what do they do for other retail outlets; what was their rate of pay when they left, if

Q Did you have any responsibility as the manager of the Merritt Island store to hire people?

A Yes, I was required to see that the store was properly staffed.

Q When you hired department managers, how did you decide what to offer as pay to do a job?

A Well, I always naturally had to keep in mind my budget limitations.

Q What was the budget limitation?

A We received directions from our central office as to the amount of budget to be used for payroll, and we had to properly staff the store, keeping in mind our budget requirements.

Q What other things did you consider?

A Well, we took into consideration experience, experience that we could relate to our particular type of field. We took into consideration primarily what we thought the person could do for us.

[609] Q When you hired someone to work in a soft lines department, what qualifications did you look for?

A Well, our requirements in that particular line weren't necessarily too stringent. We were more frequently impressed by a person's appearance and their attitude and their impression that they made on us and what they had in mind to accomplish in life.

Q Is there any difference in the qualifications that you look for in a person to go into hard lines as opposed to soft lines?

A Yes, I would be necessarily looking for a much longer span of experience and I'd have to have some more positive evidence the person would be able to function as a hard lines supervisor or manager.

Testimony of Mr. Henry

Q Were you always able to get experienced personnel at Merritt Island?

A No. As we mentioned a minute ago, we had to finally resort, because of conditions on the Island at that time, to go to our other stores and bring in some help, experienced help.

Q Were the qualifications that you considered [610] in hiring people the same for men and women?

A I don't quite understand that question.

Q When you hired someone, did you look for anything different in a man than you did in a woman to do a particular department manager's job?

A No, I wouldn't say we had any particular thing in mind as far as a man or woman is concerned.

Q In hiring a person as a department manager, what consideration, if any, did you give to past earnings?

A We gave a lot of serious thought to it. And if we felt we could acquire the services of a high-priced person for less and we could negotiate this price, we would. Or we met his present price. I am talking about quality being equal to what we were looking for.

Q In hiring persons as department manager, what consideration, if any, did you give to the current retail volume of inventory in a particular department that you were seeking to get someone for? Is that something you considered?

A I think it's safe to say that I have never [611] associated the hiring of someone with the relationship to volume or inventory peaks. The key to our success is to operate at a very, very fast inventory, which nec-

essarily means there is as low an inventory as possible.

Q As the store manager at Merritt Island, what, if anything, did you have to do with pay raises for employees in your store?

A We usually, over a period of time, reviewed a person's performance and made certain recommendations on the performance, and sometimes when we were rating a person, we would also at that time recommend a pay increase for them.

Q Did you take anything into consideration in recommending a pay increase?

A Yes, we did. The length of time they were with us. The type of work they were performing. How they were functioning. Their value to us. All those things I think which are normal in considerations.

Q Did you have the same considerations for men as you did for women employees?

A I think the key there was we looked at performance rather than anything else.

[612] Q During the time that you were at Merritt Island, did the company have an executive training program or a program to develop people for management?

A Yes, they did.

Q How did you know about it?

A Well, of course, we always received directives from our central office informing us of company's plans and programs, and no doubt during sometime or another, I received some direction saying they had a program and I followed through on it.

Q Do you know whether or not the department managers in your Merritt Island store were made aware

a direct contact with the customer, if they would pick it out and buy it themselves.

Q When you left the Eau Gallie store were you using department managers, area supervisors or both?

A I used them both.

Q Who hired people for jobs as department managers or area supervisors at the Eau Gallie store while you were there?

A When the store first opened these people were hired by a personnel representative from the New York office, and after the store was opened and they left for various reasons, my assistant was, would interview them. If it was a department manager and we would mutually decide whether or not I would make the final decision as to whether or not we would hire them.

[672] Q What considerations did you take into account in connection with hiring someone; what things did you think about with relation to the person who you were going to hire as to why you would hire them or not hire them?

A If it was at this level, usually the most important thing would be their past experience, their past rate of remuneration, and what potential they had as far as advantage in our company.

Q How did you decide what to offer as pay?

A We would decide what, what to offer, based on what they had been makin , and also what the market, and in this particular category was, in the area, and what my budget would allow, and what it could produce to make it worth what we could pay them.

Q What do you mean when you considered what the market was in a particular area?

A Well, in this area, at that particular time, the labor market was pretty tight, and it was a little hard to get good people unless you did pay the going scale. We had a survey made of all the competing, all the competent stores in the area, and we knew what the scale was for the entire area.

Q Did you have any directives from the company concering rates of pay in which to hire people at?

[673] A We had guidelines.

Q In interviewing a person for a job as a department manager, what qualifications; was there any difference in the qualifications between someone being hired in the hard line and someone being hird in the soft line?

A I would say there was considerable difference, due to the technical nature of the hard line areas. Of course, the soft lines areas —

A In hiring the new employee to become a department manager, were the qualifications that you looked for any different as between men and women applicants?

A The qualifications between men and women, I actually wouldn't look for any difference in the qualifications. I wouldn't see any reason unless it was for an area; if a woman has the proper qualifications it wouldn't make any difference what area she was going into, if she was qualified.

Q As the store manager of Eau Gallie, did you have anything to do with the pay raises after you hired employees, and they worked for you?

A Yes, sir.

Q What did you do in that regard?

A I would appraise the person, and if in my opinion the appraisal showed they were entitled to an increase in [674] pay I would institute a request for an increase in pay and forward it to the district manager.

Q What things, if anything, did you consider when making a change in pay for one of your department managers?

A I considered the type of work they were doing; if they were actually performing to our standards; if the departments were being maintained the way they should; if we were getting, in the sales, if the sales were where they should be; if they were conforming to company policy, and if they were, merited an increase.

Q During your tenure at Eau Gallie, did the company have an executive training program?

A We had an executive training program; yes, sir.

Q How did you know about it?

A We had a letter from our New York office from the Industrial Relations division, and informing us of it.

Q Did you have any employees at your store in Eau Gallie while you were there who were involved in the executive training program?

A Yes, sir.

Q Did you ever during the time you were at Eau Gallie discuss the executive training program with any of your employees?

A Yes, sir.

Q What was the nature of these discussions, and who did [675] you discuss the training program with?

Q Is this a policy that's applicable to the three stores in this case?

A Yes, sir.

Q Has the policy — has this been the same policy that's been in effect during your tenure with the company?

A Basically, yes. I think at one time we did not necessarily do the 90-day review on a consistent basis, but other than that, it has been.

Q Are the factors in doing the review the same for the men and the women department managers and employees?

A Yes, sir.

Q In your position as regional personnel manager, do you ever have the occasion to look at these reviews or take part in a review process?

[460] A I have occasion to look at the reviews.

Q Are they something in writing?

A Yes, we have a nonsupervisory appraisal form and we have a department manager appraisal form.

Q Have you ever had the occasion to discuss these reviews with employees who were subject of the reviews?

A I don't recall any at this time.

Q Is there a person in the company who would normally have such a function?

A Yes.

Q Who would that be?

A The store manager.

Q Would that be the store manager in each of the three stores in this case?

Testimony of Ray C. Simmons

[448] DIRECT EXAMINATION

BY MR. SUBIN:

Q Are you Ray C. Simons?

A Yes, I am.

Q Are you the same Ray Simons who testified earlier in this case?

A Yes, sir.

Q You understand that you are under the same oath that you were administered at the time that you took the stand a day or two ago?

A Yes, I do.

Q Where do you reside, Mr. Simons?

A 4449 Fulton Road, Jacksonville.

Q What is your occupation?

A Southern regional personnel director for J. M. Fields.

[449] Q How long have you had that occupation?

A Six years.

Q Where is your office?

A Jacksonville, Florida.

Q Will you please define your duties.

A Yes, sir. I am responsible for the interviewing and recruiting of management type personnel. I am responsible for travel in the field to see that the stores follow company policies and company procedures as set forth by our company to see that the stores are in compliance with the Federal Wage Hour Laws, the Equal Opportunity Laws, the Equal Pay Laws, and

the various assortments of state and federal regulations concerning the stores.

I also am responsible for wage and salary administration in the field. I am responsible for visiting with the store employees, the store managers, checking on the morale of the various stores or the morale of the employees in the various stores.

I see when I go into the stores that the stores are maintaining their personnel files in the manner as prescribed by company policy. I am responsible for certain [450] training activities of the company. I am responsible for seeing that our training program and the training of future company executives is carried out.

Q Mr. Simons, what geographical area do your duties encompass coverage of?

A From Wilmington, North Carolina, on the northern border to Miami, Florida, on the southern border.

Q Do you have responsibility to perform your duties with respect to the J. M. Fields in Tallahassee, Florida; Merritt Island, Florida; and Eau Gallie, Melbourne Florida?

A Yes, sir, I do.

Q Do you report in the course of your duties to any other employee in the company?

A Yes, I report to Mr. Jerry Walker.

Q And do you know what his title is?

A Vice-president of industrial relations.

Q Where is his office, please, sir?

A New York.

Testimony of Jerry Walker

BY MR. SUBIN:

Q Mr. Walker, do you know whether or not there is a company policy with respect to clients with Federal laws having to do with employment practices?

A I know that the company policy is in all cases is to comply with the Federal laws.

Q Do you know whether or not that policy is applicable company wide?

A It is.

Q Who is responsible, directly responsible at the top level of the company management structure for compliance with the Fair Labor Standards Act?

A Well, if you want to know who would be held accountable in the company, it would be yours truly.

Q What if anything do you do to insure, compliance with the Fair Labor or Standards Act as a part of your official duties?

[762] A What I have done is to publish a host of instructions; all letters and notes at any time they might have been a change in the minimum wages, for example, the qualification for exemptions from the minimum wage law periodically, just for good health, I would publish such instructions.

We hold meetings in our district; in our company there are nine districts. They hold training meetings with their store managers periodically. And I have attended, in the last three years a minimum of 15 such district meetings, and at such times talked about compliance with labor laws, among other things.

Additionally, we have held, since I have come to the company, three store managers training conferenc-

es, and at each of these training conferences the store managers assembled as a group, I have personally discussed these issues; further these training conferences are operated in a conference style, or in a case method style.

At least one problem each year is devoted to manager responsibility and the administration of the people within this store; and these conferences are headed by conference leaders trained by me as to what is to come out at the conference.

Q During the time you have been with J. M. Fields have [763] these conferences and these different things you have just described included a contact with the managers at the Tallahassee, Merritt Island and Eau Gallie stores?

A I have visited each of those stores at least twice, I think, maybe three, three times, and it would be quite natural to discuss in the store, first of all, I make a routine inspection to see if they have their posters up, and that stuff.

And, I would never discuss with them issues relating to those points, to the store managers.

Q Do those stores attend the conferences you have mentioned?

A Oh, yes.

Q Mr. Walker, I hand you a document which I am going to ask the clerk to mark as our next document for identification purposes, 17.

THE CLERK:

Defendant's Exhibits 18, 19 and 20 for identification.

Defendant's Exhibit 11

TO: OFFICE MANAGERS
DISTRICT MANAGERS
STORE MANAGERS

FROM: INDUSTRIAL RELATIONS DIVISION

SUBJECT: New Record Keeping Regulations

DATE: May 18, 1964

As you know, the Equal Pay Act becomes effective June 11th, 1964. Such act prohibits wage differentials based on sex.

Based on a review of the current situation, your company is in full compliance of the new law.

However, it is now necessary that all employers shall be required to record the sex as well as the occupation of employees on records which shall be preserved for at least two years.

For our purposes you may record the sex of employees either by use of the prefixes Mr., Mrs. or Miss, or by the words "Male" or "Female".

If you have any questions relating to the above Federal regulation, please contact this office.

Defendant's Exhibit 12

TO: Store Managers

FROM: Industrial Relations Division

DATE: March 25, 1966

SUBJECT: Equal Pay Law

Please be reminded that it is a violation of a federal law to hire people at dissimilar rates merely on the basis of sex.

For example, persons hired to do exactly the same job, who both bring the same amount of experience and background to that job, should receive identical rates of pay.

Obviously, there are legitimate reasons why either a woman or a man is worthy of being hired at a higher rate of pay than another candidate. Such reasons must be logical and factual, however, and must be clearly noted on the employment application at the time of hiring.

(Signed) MORTON D. SIEGEL

cc: District Managers
Regional Personnel Directors

Defendant's Exhibit 17

DATE: April 25, 1968

TO: R. Hunt
R. Simmons
R. Bengraff
District Managers
Store Managers

FROM: J. A. Walker

SUBJECT: Equal Pay for Equal Work

The law at present forbids paying different wages to men and women who are performing essentially the same work when the difference in pay occurs only because of the sex of the individual. In our *scheduling and compensating* employees, especially Department Mgrs. it is imperative that we remember this fact.

It is perfectly proper to pay one employee more than another based upon personal qualifications or difficulty of the job. Problems will occur when we have a male and a female employee with essentially the same background and qualifications performing work requiring the same degree of skill and knowledge but receiving different compensation.

The government is enforcing this principle through its Wage and Hour Division.

Responsible executives should at once study their staff to be certain that we are not in violation of the law.

District Managers should advise me promptly of any problems to foresee.

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Supreme Court, U. S.
FILED
MAR 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. [redacted]

J. M. FIELDS, INC.,

Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1066

J. M. FIELDS, INC.,

Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

I.

INTEREST OF THE AMICUS CURIAE*

The American Retail Federation (hereafter "ARF") is an organization composed of seventy-eight national and state retail associations, the membership of these associations consists of a wide variety of retail businesses, ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the ARF

* Pursuant to Rule 42(1) of the Rules of the Supreme Court of the United States, the written consents of all parties hereto have been obtained and have been lodged with the Clerk of the Court.

represents approximately eight hundred thousand retailers with close to six million employees.

The issue presented here—the proper standards to apply in determining the scope of injunctive relief under the Equal Pay Act (hereafter the "EPA")[1]—is an important question which is likely to recur in virtually every action instigated against multi-establishment employers. The ARF's interest in this case is therefore predicated on the far reaching consequences the resolution of this issue will have to retailers generally and the future administration of the Act.

Because of the absence of uniform judicial guidelines in equal pay cases, the Secretary has consistently urged in the lower courts that a company-wide injunction is necessary and appropriate whenever proof of violation is established at a single or several units of a multi-establishment or chain store enterprise. This *per se* position has been advocated without regard to the size or geographic distribution of the enterprise, the nature or complexity of the violations or pay practices involved or an employer's good faith affirmative efforts to comply with the law generally.

The Fifth Circuit's decision below—approving a nation and classification-wide injunction against an entire retail chain based solely upon an *ad hoc* finding of isolated violations at three of the employer's retail units—has, in direct conflict with the position of the Court of Appeals for the Second and Eighth Circuits[2], embraced the Secretary's position on grounds of "administrative necessity" and, thereby created a substantial conflict between the Circuits which has not yet, but should be resolved, by this Court. The instant case, accordingly, raises a matter of vital concern to all employers. It is for that reason that the ARF respectfully submits its views.

---

1. Equal Pay Act of 1963, 29 U. S. C. Sec. 206(d).

2. See, *Hodgson* v. *Corning Glass Works*, 474 F. 2d 226 (2nd Cir., 1973); *Hodgson* v. *American Can Co.*, 440 F. 2d 916 (8th Cir., 1971).

II.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of federal law which has not been, but should be, resolved by this Court. The imposition of a chain-wide injunction, absent proof of a policy of discrimination extending beyond the units or job categories where violations are established, conflicts with traditional enforcement standards heretofore applied by this and other courts under other regulatory statutes. Heretofore, the rule has always been that the scope of injunctive relief must bear some reasonable relationship to the proven violations. *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953). Accordingly, blanket orders extending beyond those violations established have been rejected, for example, in employment discrimination cases arising under the National Labor Relations Act absent a showing 'that they bear some semblance to that which the employer has committed or that their commission in the future is to be anticipated from their commission in the past." *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426 (1941).[3] This means, as this

3. Before enactment of the E. P. A., the courts uniformly rejected efforts to secure companywide injunctions under the parent Fair Labor Standards Act provisions where such relief was also predicated solely upon violations committed at only one or more of an employer's nationwide facilities. See, *e.g.*, *Lenroot* v. *Interstate Bakeries Corporation*, 146 F. 2d 325, 329 (7th Cir., 1943) involving the child labor provisions of the Act rejecting such blanket relief absent evidence that "the Act was violated throughout the system of bakery plants operated by the company." Indeed, the Fifth Circuit in *Fleming* v. *Jacksonville Paper Co.*, 128 F. 2d 395, 399 (5th Cir. 1941) set aside an injunctive prohibition against "violating any of the provisions" of the FLSA where, as here, allegations and proof were limited to specific violations at specific facilities because it went beyond ". . . such violations as were found to have been committed, and similar ones." *Hodgson* v. *First Federal Savings and Loan Assn.*, 455 F. 2d 818 (5th Cir., 1972) involving the FLSA discrimination provisions and principally relied upon by the decision below (Pet. for Cert., App. at p. 17a) is not to the *contra;* in that case the Secretary affirmatively established a policy of age discrimination "not only with respect to tellers and trainees", but with respect to other jobs" as well. *Id.* at 826.

Court explained in *W. T. Grant, supra,* at 633, that ". . . the moving party must satisfy the court that relief is needed [because] there exists some cognizable danger of recurrent violations, something more than the mere possibility of a future violation." To conclude, as the court below did, that *all employment categories* at *all of a multi-employer's establishments* must be encompassed within "an injunction of such general character where issues and proof . . . [are] . . . limited solely to . . ." isolated employer categories within only several individual establishments carves out an exception for EPA cases in breach of these elementary principles which is ". . . violative of the most elementary principles of justice." *New Haven & H. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, 404 (1906),[4] This radical departure from established remedial principles for remedying wage discrimination violations, it is submitted, warrants this Court's review.

2. Consistent with traditional equitable relief standards, most courts[5]—including the Court of Appeals for the Second and Eighth Circuits have rejected this *per se* approach and refused to apply such blanket injunctive relief absent a showing of a policy of discrimination extending beyond the units and job categories where violations have been established. The Secretary's initial effort to secure appellate court approval for his position was flatly rejected by the Eighth Circuit in *Hodgson*

4. The Court of Appeals below, while sustaining the district courts' approval of a chain-wide injunction, initially reversed, *sua sponte,* the entry of an injunction covering all of Petitioner's employees "because there was no proof of discrimination in classes of employees other than Area Supervisors . . ." Upon the Secretary's petition for rehearing, the Court modified its opinion to encompass all other employment classifications far beyond the limited "class of employees involved in the litigation." *Pet. for Cert.,* App. pp. 18a-20a.

5. See, *Hodgson* v. *Corning Glass Works,* 474 F. 2d 226 (2nd Cir. 1973); *Hodgson* v. *American Can Co.,* 440 F. 2d 916 (8th Cir. 1971). See also, *Hodgson* v. *Robert Hall Clothes, Inc.,* 326 F. Supp. 1264 (D. C. Del., 1971) and *Hodgson* v. *Food Fair Stores, Inc.,* 329 F. Supp. 102 (D. C. Pa., 1971). But, *cf., Hodgson* v. *City Stores, Inc.,* 20 W. H. Cases 600 (N. D. Ala., March 9, 1972).

v. *American Can Co.*, 440 F. 2d 916 (1971) involving EPA violations at a single facility of the employer's vast network of national manufacturing facilities. These isolated violations and the employer's insistence upon judicially challenging the Secretary's administrative interpretations were deemed clearly insufficient by the Eighth Circuit to warrant the sweeping relief sought because of the absence of "evidence relating to the discriminatory conduct of American Can at its other plants." *American Can Co., supra* at 921. In agreement with this view, the Second Circuit in *Hodgsen* v. *Corning Glass Works*, 474 F. 2d 226, 236 (1973) similarly concluded that "absent a policy of discrimination which extends beyond the plants at issue . . ., there is no basis for a national injunction." This result is compelled, as the Court emphasized in quoting from this Court's decision in *NLRB* v. *Express Publishing Co.*, 312 U. S. 426, 435-436 (1941), because "the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction to broadly obey the statute and will subject the defendant to contempt proceedings if he should at any time in the future commit some new violation unlike and unrelated to that which he was originally charged." However, absent this Court's review of the decision below, and the establishment of clear enforcement guidelines suited to equal pay cases, the Secretary will continue to pursue employer-wide injunctive relief on an indiscriminate basis and the lower courts will continue to reach inconsistent results in cases of like kind and character. This is likely to result in a severe dislocation in the admin stration of the Equal Pay Act which this Court should not permit to occur.

3. By failing to require that the conduct restrained "be persuasively . . . related to the proven unlawful conduct" (*N. L. R. B.* v. *Express Publishing Co., supra,* the decision also erects an arbitrary presumption of collective guilt upon an entire enterprise. This result cannot be reconciled with the EPA's unique requirement that compliance be tested in a "job-by-job"

and individual "establishment" basis. Unlike the minimum wage, overtime restrictions and age discrimination provisions of the Fair Labor Standards Act, Title 29, U. S. C., Secs. 201, 206 (hereafter FLSA), which make no distinction between the practices and policies at an employer's separate facilities or between job categories, the EPA only prohibits discriminatory pay practices "within any establishment in which such employees are employed" where employees are performing "equal work on jobs, the performance of which requires equal skill effort and responsibility and which are performed under similar working conditions". 29 U. S. C. Sec. 206(d)[6] By failing to give any weight to these unique EPA features requiring that an employer's *compliance* with the equal pay standards be tested in an establishment-by-establishment and job-by-job basis,[7] and presuming a companywide lack of compliance, merely because

6. Moreover, in contrast to the difficult evaluation necessitated to "self police" EPA compliance, an employer can determine his compliance with FLSA minimum wage and overtime requirements by means of a simple arithmetical computation. Thus, where an employer is shown to violate these provisions at one of its establishments the application of a more stringent remedial standard which "shifts the responsibility for [future] compliance onto the employer's shoulders" may conceivably be warranted. App., p. 16a. See, *e.g.*, *Mitchell* v. *Ballenger Paving Company*, 299 F. 2d 29 (5th Cir. 1962), *cert. denied* 370 U. S. 922; and *Wirtz* v. *Allen Green & Associates, Inc.*, 379 F. 2d 198 (6th Cir. 1967) involving wage and overtime violations in the construction industry where, given the employer's violations at one construction site, a presumption that it will do so on others, absent broad injunctive relief, is not unreasonable.

7. As confirmed by the Wage-Hour Administrator, whose interpretations are accorded substantial weight in construing the statute (*e.g.*, *Idaho Sheet Metal Works* v. *Wirtz*, 383 U. S. 190, 205 (1966)) an employer does not violate the statute by paying male employees in store A more than it pays female employees in stores B, C or D even if the work performed by each is "equal". ". . . where there are a number of distinct physical places of business in which an employer's employees are employed, *compliance* with the equal pay provisions must be tested within each establishment . . . by comparing the jobs and pay of only those employees . . ." 29 C. F. R. Sec. 800.1004 (1967); 32 F. R. 2378 (emphasis supplied).

of isolated violations at a few outlets,[8] the lower court has engrafted a new compliance test onto the statute which is not consonant with the statutory scheme. This Court should decide whether such an unprecedented and far-reaching result, notwithstanding the express EPA language establishing a different compliance test, is warranted.

3. The decision below is predicated, in large part on "considerations of administrative necessity"[9]: that a contrary result "would frustrate the broad purposes of the FLSA in suits involving large corporate defendants with extensive branch operations to require the Secretary to investigate and prove violations at all of the defendant's branches to justify the issuance of a chain-wide injunction" App. at 17a. Such critical "policy considerations", affecting potentially all multi-establishment defendants in EPA cases, should finally be determined, by this Court, given the apparent contrary Congressional intent. Moreover, the basic assumptions of the Court of Appeals decision are erroneous. *First*, national injunctive relief could be warranted, even absent proof of violations at every establishment, where shown to bear a reasonable relationship to the proven violations,

8. Typically, a national retail organization will have dozens of employee categories, each performing different and, in most instances, unrelated work. Yet, if the lower court's views were to prevail, a violation respecting a single department manager in one retail establishment could be used to justify the extension of injunctive relief to employees in other establishments, in other departments, and engaged in unrelated functions, *e.g.*, mechanical service, delivery, security, maintenance, credit, auditing, accounting and real estate. Congress could not have intended such an incongruous result especially since, under the EPA's special job-by-job compliance test, a close factual scrutiny is required for even related jobs to determine where a violation has been established. See, *e.g.*, *Hodgson* v. *Brookhaven Hospital*, 436 F. 2d 719 (5th Cir., 1970).

9. "Administrative necessity" is, of course, the orthodox rationale for all punitive measures. That reason is, as the Supreme Court emphasized in *New Haven & H. R. Co.*, *supra* at 404, unacceptable, since its effect is to remove an employer from the "protection of the law of the land," and require that he "thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction."

and to the probability of future violations.[10] Where, for example, a chain-wide employer has a past history of a pattern and practice of similar violations at a significant percentage of his separate establishments and the application of "strong medicine" is necessary to deter future violations,[11] or the proven violations are the necessary product of a *uniform and nationally administered wage program* and relief is necessary to remove the root cause of the violation,[12] such extraordinary relief would then be appropriate. *Second*, the assumption that a chain-wide injunction is appropriate because it only says, "do what the law requires" (Pet. for Cert., App. p. 16a), is a gross over-simplification, particularly in equal pay cases. As noted, it is not always possible to know with certainty what the law does require under

10. As shown above, traditional equity standards require that there be an essential nexus between the proven violations and the scope of any remedy proposed under a remedial statute. ***NLRB*** v. *Express Publishing, supra.* The "mere possibility" that violations have or may occur elsewhere is plainly an insufficient standard by which to measure the necessity for broader injunctive relief. *United States* v. *W. T Grant Co.*, 345 U. S. 629 (1963).

11. The Courts have properly sanctioned extraordinary remedies when necessary to restrain an employer whose past "flagrant violations" demonstrate a proclivity to ignore the purposes and policies of the law. See, *e.g., J. P. Stevens & Co.* v. ***NLRB***, 417 F. 2d 533 (5th Cir., 1965).

12. Manifestly, the elements of "centralized control" relied upon by the lower court here cannot satisfy this standard. Petitioner's national wage administration, like that of large retail concerns generally, is limited to the establishment of broad "salary ranges appropriate for different geographic areas and classes of employees" (Pet. for Cert., App., p. 5a) with local management assuming the responsibility for initially fixing individual rates and subsequent pay increases subject only to final perfunctory "approval by . . . regional personnel" or corporate headquarters. Such "wage centralization", with the home office only establishing broad salary ranges within which local management may freely operate, do not produce equal pay violations since the "differences or similarities in each [job in each establishment] must determine the ultimate outcome under the Equal Pay Act." *Hodgson* v. *Golden Isles Nursing Homes, Inc.*, 468 F. 2d 1256, 1258 (5th Cir., 1972). Only where there is a direct established nexus between pervasive violations of the law, and nationally or centrally administered directives can centralized control justifiably be the basis for a national injunction.

the EPA;[13] where reasonable differences exist, an employer should be free to challenge the Secretary's determinations ". . . unfettered, in the process, by the prospect of contempt proceedings". *Mitchell* v. *Hodges*, 238 F. 2d 380 (5th Cir., 1956). Few national employers will take that risk, however, if it means being subjected to either a chain-wide or classification-wide injunction.[14] The Secretary will then become the final arbiter of EPA interpretations, removing the courts from their intended role.[15] Indeed, given the complexity of the EPA and the variety of circumstances presented in most equal pay cases, judicial clari-

13. In addition to making a close factual scrutiny of each job based upon the actual work performed (*Hodgson* v. *Brookhaven General Hospital, supra.*) to determine whether the three separate tests—"equal skill, equal effort and equal responsibility"—for equal-pay responsibility have been met (See 29 C. F. R. Sec. 800.122), an employer may also be relieved of any obligation even if job "equality" is shown if the pay differential is predicated upon any one of the following additional enumerated Section 6(d) factors: (1) seniority systems; (2) merit systems; (3) systems which measure earnings by quantity or quality of production or (4) any factor other than sex. The incorporation of these factors, as the Report of the House Committee reporting favorably on the legislation underlines, "recognizes that there are many factors which may be used to measure the relationship between jobs and which establish a valid basis for a difference in pay . . ." 109 Cong. Rec. 9210.

14. The sanctions which violations of an injunction may bring cannot be minimized: An injunction, once entered, may apply indefinitely (*e.g., Wirtz* v. *Graham Transfer*, 322 F. 2d 650, 5th Cir., 1963), and subject an employer to substantial fines, attorneys fees or even criminal convictions, if it is breached. See, *e.g., Tobin Barreda*, 9 W. H. Cases 534 (D. C. Pr., 1950) (the Secretary sought and obtained a contempt citation 10 years after the entry of the original decree); *Frost-Arnett Co.* v. *Tobin*, 264 F. 2d 246 (6th Cir., 1959) (court may order employer found in civil contempt to pay fine to compensate government for expenses in investigating and prosecuting contempt); and *Mitchell* v. *Maynard*, 13 W. H. Cases 434 (D. C. Ala., 1957) (employer could be imprisoned until he satisfactorily complied with disobedience of prior order).

15. The Secretary's interpretations, although entitled to appropriate respect, are not conclusive on the courts. In contrast to "legislative" rules or regulations having the force of law, the Secretary's guidelines are "interpretative" opinions which have validity only to the extent that they constitute a correct construction of the statutory requisites. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).

fication is often essential,[16] and frequently the Secretary's interpretation will be rejected.[17] These unwarranted ramifications should have, but were not, considered by the lower court in its decision.

4. Although a substantial proportion of retail sales in this country are made today by large retail concerns doing business in hundreds and, in many instances, thousands of separate and widely distributed retail establishments, retailing remains an essentially local operation[18] where, because individual wage rates must be set locally to reflect local market conditions, inadvertent pay violations will occur despite substantial affirmative efforts by parent headquarters to police compliance with the EPA requirements. To utilize such "affirmative action" to make an employer as a "willful" violator and, inferentially at least, as the proper subject for a national injunction, clearly serves to penalize and discourage such voluntary centralized "affirmative action" efforts while rewarding those who ignore their public responsibilities. Yet, this is precisely what the lower court's

16. Given the EPA's complexities, the courts themselves will frequently differ concerning identical job classifications. Thus, the district courts have split equally on the decision of whether male orderlies and female nursing aides have equivalent jobs. For example, see: *Schultz* v. *Kentucky Baptist Hospital*, 19 W. H. Cases 403 (D. C. W. D. Ky., 1969) and *Hodgson* v. *Good Shepherd Hospital*, 19 W. H. Cases 1067 (D. C. E. D. Tex., 1971) where the jobs were held non-equivalent; and *Hodgson* v. *Hubbard Hospital*, 20 W. H. Cases 248 (D. C. M. D. Tenn. 1971) and *Hodgson* v. *Lancaster Hospital Association* (D. C. E. D. Pa., 1971) 20 W. H. Cases 139, where the opposite results were reached.

17. See, *e.g.*, *Hodgson* v. *Robert Hall Clothes, Inc.*, 473 F. 2d 589 (3rd Cir., 1973) rejecting the Secretary's view that economic benefit to the employer cannot be used to justify wage differentials between sales-persons in the men's and women's clothing departments.

18. National chain stores typically have a unit situated in every small town and city in this nation. In 1963, there were over 1.7 million of such individual retail establishments covering the length and breadth of the country and this trend has increased substantially since that time. See Applebaum, *Consumption and Geography of Retail Distribution in the United States, Michigan* State University Business Topics, Summer, 1967, pp. 26-27.

"knew the FLSA was in the picture"—*Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139 (5th Cir., 1972), "willful" violation standard—accomplishes when applied to "equal pay" cases. Given the myriad comparisons necessary to effect EPA compliance, this incongruous result provides an additional and independent basis warranting this Court's review.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by the Petitioner, the Petition for Writ or Certiorari should be granted.

Respectfully submitted,

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MAR 27 1974

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1348

J. M. FIELDS, INC.,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

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OCTOBER TERM, 1973

No. 73-1348

J. M. FIELDS, INC.,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of this Court for leave to file the attached brief *amicus curiae* in support of Petitioner in the instant case.

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters

in this Court vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.*

The instant proceeding is of particular concern to the Chamber's members, a number of whom conduct their business on a widespread geographic, multi-establishment basis and are, therefore, directly affected by the decision below, interpreting the scope of injunctive relief under the Equal Pay Act.**

The issues of primary concern to the Chamber and its members, and, indeed, of significant national importance relevant to the interpretation of the EPA presented herein are:

1. Whether isolated instances of non-willful violations, involving one job classification, at one or a few locations of multi-establishment operations, are a sufficient predicate upon which a nationwide injunction may be imposed upon all of the employer's locations; and

2. Whether, despite a multi-establishment employer's affirmative efforts to secure chainwide compliance with the

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* *E.G., Corning Glass Works* v. *Brennan*, No. 73-29; *Geduldig* v. *Aiello*, No. 73-640; *William E. Arnold* v. *Carpenters*, No. 73-466; *Howard Johnson Company, Inc.* v. *Detroit Joint Executive Board, Hotel and Restaurant Employers and Bartenders International Union AFL-CIO*, No. 73-631; *Gateway Coal Company* v. *United Mineworkers of America, et al.*, —— U.S. —— (No. 72-782, Jan., 1974); *Super Tire Engineering Company, et al.* v. *Lloyd W. McCorkle, et al.*, No. 72-1554; *Marco DeFunis* v. *Odegaard*, No. 73-235; *Corning Glass Works* v. *Brennan*, No. 73-29; *N.L.R.B.* v. *Bell Aerospace Company Division of Textron, Inc.*, No. 72-1598; *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952 (1973); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 917 (1971).

** Equal Pay Act of 1963 (hereinafter the EPA or the act), 29 USC Sec. 206(d).

Act, a failure to police those efforts, which results in isolated violations with respect to one job classification at one or a few locations, is evidence of a willful conduct sufficient to warrant a nationwide injunction involving all job classifications throughout the country.

Despite the fact that the only violations of the EPA alleged and found by the District Court below were nonwillful, involving a single job classification at three out of Petitioner's then sixty-six stores, the Court of Appeals issued a nationwide injunction, enjoining Petitioner from engaging in future violations in *any and all* job classifications in *all* of its stores. The effect of an injunction of such broad scope is to subject a multi-establishment employer to civil and criminal contempt for any future violation—regardless of how unintended or mistaken—engaged in by local management at any location.

The far reaching consequences of the Court of Appeals' decision is of particular significance to the Chamber and its members in that the imposition of such drastic relief, without factual predicate and, in fact, based in part on the employer's unsuccessful efforts to secure chainwide compliance with EPA, arbitrarily creates a presumption of guilt that could never be overcome and that is contrary to the express language and policy of the Act. Accordingly, the Chamber is vitally concerned that the Court consider the issues presented by the instant case. Further, because of its broad representation of employers, the Chamber is in a position to present arguments to the Court concerning those issues that might not otherwise be advanced by the parties.

WHEREFORE, for the foregoing reasons, the Chamber of Commerce of the United States respectfully requests that this Motion for Leave to File an Amicus brief be granted.

Respectfully submitted,

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IN THE

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J. M. FIELDS, INC.,
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PETER J. BRENNAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

The interest of the *amicus curiae* is set forth in the foregoing Motion.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS NEVER CONSIDERED THE SCOPE OF INJUNCTIVE RELIEF AVAILABLE UNDER THE EQUAL PAY PROVISIONS OF THE FAIR LABOR STANDARDS ACT

The instant case presents important questions of first impression involving interpretation of the Equal Pay Act of 1963.[1] Specifically, the issues raised by the instant case seek interpretation of the scope of injunctive relief available to the Secretary of Labor under the Act, and the bases, if any, that would sustain the imposition of such extreme relief as was granted by the lower court herein.

Since the Secretary, charged with the responsibility of administrating the Act and seeking appropriate remedies for violations thereof, apparently feels that blanket injunctive relief is necessary and appropriate whenever it is determined that a national multi-establishment employer has engaged in isolated violations,[2] consideration by

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[1] Section 6(d) of the Fair Labor Standards Act of 1938 as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 USC Sec. 206(d).

[2] Recently, the Secretary has embarked upon a campaign advocating the need for blanket injunctive relief in virtually every equal pay case brought against a national employer. See, *Hodgson* v. *Robert Hall Clothes, Inc.*, 326 F. Supp. 1364 (D.C. Del., 1971), *aff'd, in part and reversed in part*, 473 F.2d 589 (CA 3, 1973), *cert. denied*, —— U.S. ——, 21 WH299 (1973) [The Secretary did not appeal the District Court's adverse ruling with respect to his request for a blanket injunction, and this issue was not, therefore, considered on appeal]; *Hodgson* v. *American Can Co.*, 440 F.2d 916 (CA 8, 1971); *Hodgson* v. *City Stores, Inc.*, 332 F. Supp. 942 (M.D. Ala., 1972), *aff'd. sub nom, Brennan* v. *City Stores, Inc.*, 470 F.2d 235 (CA 9, 1973), *rehearing en banc denied*, —— F.2d ——, 21 WH 317 (CA 5, 1973); *Hodgson* v. *Food Fair Stores, Inc.*, 329 F. Supp. 102 (M.D. Pa., 1971); *Brennan* v. *Corning Glass Works*, 474 F.2d 266 (CA 2, 1973), *cert. granted*, Sup. Ct. Case No. 73-29 [In *Corning*, the Second Circuit reversed the District Court's

this Court of the Secretary's expansive interpretation of the Act is essential to provide the necessary guidelines required by the lower courts, the Secretary, and those in the business community who are subjected to such burdensome and extreme orders.

II.

THE LOWER COURT ERRONEOUSLY AND IMPERMISSIBLY DECIDED IMPORTANT QUESTIONS OF LAW HAVING SUBSTANTIAL IMPACT ON THE FUTURE ADMINISTRATION OF THE ACT

A. Absent Evidence Of Chain-Wide Policy Or Proven History Of Proclivity To Violate The Act, Isolated Violations Are An Insufficient Predicate For The Issuance Of A Nationwide Injunction

The specific language of Section 6(d)(1) of the Act,[3] unlike the minimum wage and overtime provisions of the Fair Labor Standards Act, contains two unique features.

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grant of a blanket injunction which would have extended to Corning's 26 locations. The Secretary did not seek review of the injunction issue in this Court]; *Hodgson* v. *Sears, Roebuck and Co.*, —— F. Supp. ——, 20 WH 611 (WD Ky. 1972).

[3] Section 6(d)(1) provides: "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

First, the Act confines proscription only to sexually discriminatory pay practices between employees working within the same "establishment."[4] Second, the Act requires job comparison to determine whether the lower paid employees are performing "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions."

Thus, before the proscriptions of the Act attach, it must be established by evidence that the three prerequisites for equality—skill, effort and responsibility—of the jobs being compared, exist.[5] The lower court herein has itself recognized the necessity of establishing, on a job by job basis, the evidentiary and factual existence of these three essential requirements, *Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719 (CA 5, 1970), and has rejected, on prior occasion, the Secretary's contention that such analysis could be dispensed with. *Hodgson* v. *Golden Isles Nursing Home, Inc.*, 468 F. 2d 1256, 1258 (CA 5, 1972).

In the instant case, however, the court below disregarded both the "establishment by establishment" and "job by job" criteria in determining that a nationwide injunction—encompassing not only the job category in question, but also each and every job classification in the

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[4] This unique feature of the Equal Pay Act is confirmed in the interpretive regulations issued by the Wage and Hour Administration. Sec. 29 CFR Sec. 800.104. As interpreted by the Administrator, the term "establishment" is construed under the Fair Labor Standards Act to mean a single "unit store". Sec. 29 CFR Secs. 800.103; 779.304. In construing the Fair Labor Standards Act, the Administrator's interpretive regulations are entitled to substantial weight. *United States* v. *American Trucking Assns.*, 310 U.S. 534, 549 (1940); *Idaho Sheet Metal Workers* v. *Wirtz*, 383 U.S. 190-205 (1966).

[5] As interpreted by the Wage-Hour Administrator, the terms "equal skill, effort and responsibility" refer to three separate tests. 29 CFR Sec. 800.122.

Petitioner's chain throughout the country—was appropriate.

The *Amicus* recognizes that when evidence establishes, and the factual findings disclose, the existence of unlawful wage *policies*, or the employer has a past history of repeated violations at a large percentage of his establishments,[6] there may be a basis for issuance of an order sufficiently broad to assure compliance with the Act. However, in the absence of such basis, a court errs in issuing a broad injunction, the scope of which has no relationship to proven violations of the statute in question. *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426 (1941).

In the instant case, the lower court found no policy or cumulative history of past violations. On the contrary, the Court acknowledged Petitioner's pursuit of a chain-wide program to secure compliance with the Act and the only proven violations were isolated instances reflecting, at the most, mistakes or negligence of local management. The court rationalized its broad order by relying on "administrative necessity",[7] and by designating the Petitioner's failure to prevent isolated violations, when it was aware of the Act, as *willful* conduct justifying the imposition of contempt liability in the event of any future violation, no matter how unintended or remote.

In support of this latter rationale, the lower court relied upon the test it formulated for "willfulness" in *Cole-*

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[6] *Wirtz* v. *Atlas Roofing Manufacturing Co.*, 377 F.2d 112, 116 (CA 5, 1967).

[7] "It would frustrate the broad purposes of the FLSA [Fair Labor Standards Act] in suits involving large corporate defendants with extensive branch operations to require the Secretary to investigate and prove violations in all or substantially all of the defendant's branches to justify the issuance of a chain-wide injunction. Considerations of administrative necessity are persuasive as warranting the chain-wide injunction issued below." *Brennan* v. *Fields, Inc.*, 488 F.2d 443, 21 WH409, 414 (CA 5, 1973).

man v. *Jeffy June Farms, Inc.*, 458 F. 2d 1139 (CA 5, 1970), wherein the court held: "Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?" *Id.* at 1142. Aside from the impression of such a vague "test", the lower court's "leap" from the mere fact of knowledge of the existence of the EPA to the conclusion that the few isolated violations herein were willful, bypasses the essential element of intent. Mere knowledge does not equal intent where, as here, there was no evidence of an unlawful policy or proclivity but, rather, evidence of a sincere effort to comply with the Act. Similarly, the hue and cry of "administrative necessity" can not supplant the due process need for proof. The consequences of such reasoning would in serious ways, as demonstrated below, seriously restructure the fundamental character of the Act and impose intolerable and impermissible burdens on every national multi-establishment employer in the country.

B. The Lower Court's Decision Shifts The Burden Of Proof, Creates A Presumption Of Guilt And Renders The Act Punitive

As the lower court has recognized, the Secretary has the burden of proving "equality of work and inequality of pay" for each job classification challenged. *Hodgson* v. *Brookhaven General Hospital*, *supra*, and has heretofore rejected the *per se* approach it adopted in the instant case. *Hodgson* v. *Golden Isles Nursing Home, Inc.*, *supra*. However, under the approach taken herein the Secretary need only prove a violation at a single establishment among a large chain to obtain a finding of a companywide violation and issuance of a nationwide injunction covering perhaps hundreds of facilities and every single job classification within those facilities. The Secretary is completely relieved of his burden of proof. He could obtain such an order without having to meet the job comparison requirements of proving equal skill, effort

and responsibility—requirements heretofore necessary to establish the existence of a violation. Further, the *per se* approach vitiates any local differences which might render the Act inapplicable to any job in question or render any pay differential with respect to that job exempt.

That Congress recognized the existence of an "establishment by establishment" criterion is clearly manifested by both the job comparison requirement and the factors providing for exemption of pay differentials based on seniority systems, merit systems, systems which measure earnings by quantity or quality of production, or differentials based on any other factor other than sex. Certainly, for every multi-establishment employer any one or a number of combinations of these factors might be present in some establishment and not in others. If present, there might be differences necessitated by local conditions or labor agreements. Simply, the lower court, in arming the Secretary with a nationwide injunction, permits the Secretary to avoid his burdens of proof and deprives the employer the right to assert defenses based on the legitimate factors which Congress has recognized exist in the business world.

The lower court's decision, its *per se* approach, and its order, in effect, have created a presumption of corporate guill, which after the issuance of the order, subjects local management, never found to have violated the Act before, in contempt sanctions. While the Employer could, in a contempt proceeding, raise the same issues that he could at an initial trial, his burden of proving compliance in the face of a previously issued injunction would be "a heavy one". *Hodgson* v. *Hobard*, 436 F. 2d 1110, 1115 (CA 5, 1971).

As a further consequence of the lower court's action, the Act is rendered punitive rather than remedial. Where, as in the instant case, the harsh remedy bears no reason-

able nexus to the proven violations, thus failing to establish a "cognizable danger of recurrent violation, something more than the mere possibility of a future violation", *United States* v. *W. T. Grant & Co., supra*, at 633, the remedy is punitive. A future violation, no matter how remote renders the employer subject to fine and criminal penalties[8] Such consequences could not have been intended by Congress, and alter the very nature of the Act.

III.

THE LOWER COURT'S DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, THOSE OF OTHER CIRCUIT COURTS OF APPEALS, AND ITS OWN, AS WELL

In serving its broad order having no relationship to the violations charged or proven, the decision of the court below contravenes this court's repeated condemnation of such injunctions.[9] Further, both the Second Circuit in *Brennan* v. *Corning Glass Works, supra* and the Eighth Circuit in *Hodgson* v. *American Can Co., supra*, rejected the Secretary's plea for nationwide injunctions where, as here, there was no showing of widespread violations nor evidence of a chainwide policy of discrimination[10] Moreover, the instant decision is in conflict with the Fifth Circuit's own decisions in *Brookhaven General Hospital, supra*, and *Golden Isles Nursing Home, supra*,

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[8] See, e.g., *Tobin* v. *Barreda*, 9 WH 471 (D.C. P.R. 534); *Frost-Arnett Co.* v. *Tobin*, 264 F.2d 246 (CA 6, 1959); *Mitchell* v. *Maynard*, 13 WH 434 (M.D. Ala., 1957).

[9] *N.L.R.B.* v. *Express Publishing Co., supra; United States* v. *W.T. Grant Co., supra; FTC* v. *Henry Broch & Co.*, 368 U.S. 350 (1962).

[10] See, also, *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949), to the effect injunctive relief is appropriate only from showing of "a proclivity for unlawful conduct" of a "remand of continuing and persistent violations of the Act."

by relieving the Secretary of his burden of proof and approving the *per se* approach with respect to that burden; and *Wirtz* v. *Atlas Roofing Manufacturing Co.*, 377 F. 2d 112 (CA 5, 1967) and *Hodgson* v. *Parks d/b/a Southwestern Guard Service*, 413 F. 2d 1364 (CA 5, 1969), on remand 324 F. Supp. 1297 (SD Tex. 1971), and cases cited therein, where, according to the Fifth Circuit's clearly expressed views, the appropriateness of injunctive relief against future violations of the FLSA rests upon a demonstrated historical proclivity to violate the Act indicative of a policy of disregard for the law.

Because of the significance of the problem presented herein and the conflicts not only between this Court and the Fifth Circuit, and between the circuits, but also among the various contradictory views held by the Fifth Circuit, the need to establish a uniformity that will well serve the courts, the Secretary and all affected employers alike is patent.

CONCLUSION

For the foregoing reasons, as well as those urged by Petitioner, it is respectfully submitted that the Petition for Writ of Certiorari previously filed herein be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1348

J. M. FIELDS, INC., PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a–18a) and its opinion on rehearing (Pet. App. 19a–20a) are reported at 488 F. 2d 443. The opinion of the district court (Pet. App. 26a–36a) is reported at 335 F. Supp. 731.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1973 (Pet. App. 1a–2a). On January 17, 1974, the court entered an order modifying its opinion (Pet. App. 19a–20a), pursuant to a timely petition for rehearing.[1] The petition for a writ of

[1] A copy of the Secretary's petition for rehearing is being lodged with the Clerk, along with a copy of the Appendix below, referred to here as "A."

certiorari was filed on March 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in light of the evidence of petitioner's centralized control over the wage practices of its chain of department stores, including the three stores found to be in violation of the Equal Pay Act, the district court properly issued a chain-wide injunction.

2. Whether petitioner, having full knowledge of the Equal Pay Act, acted "willfully" for purposes of the 3-year statute of limitations (29 U.S.C. 255) when it continued to pay lower wage rates to women area supervisors than to men area supervisors performing equal work.[2]

STATUTE INVOLVED

The pertinent equal pay provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, are set forth in the petition (Pet. 4–5).

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[2] The question whether "hardline" and "softline" managers' jobs are equal for the purposes of the Equal Pay Act (Fields' Question 4; see *infra*, pp. 3–4) is not ripe for review in view of the remand of that question to the district court for further findings (Pet. App. 12a–13a; see *infra*, pp. 8–9). This remand does not mean, as Fields implies (Fields' Question 4; Pet. 4, 10, 19–20), that the Secretary failed to carry his burden of proving violations in the first instance. On the contrary, resolution of the "hardline v. softline" issue in the Secretary's favor would simply mean that the violations are even more extensive than the trial court found them to be.

Fields' Question 2, whether the injunction should have been limited to the category of employees (Area Supervisor) as to which violations had been proven, was not raised until the Secretary moved for rehearing (see *infra*, p. 7).

STATEMENT

This action was brought by the Secretary of Labor in the United States District Court for the Middle District of Florida to enjoin J. M. Fields, Inc. ("Fields") from violating the equal pay provisions of the Fair Labor Standards Act, known as the Equal Pay Act of 1963 (29 U.S.C. 206(d)(1)).

Petitioner Fields owns, operates and controls a chain of more than 60 discount department stores in 11 States on the eastern seaboard (A. 9, 11, 738).[3] Fields' headquarters are in New York City, but, through its nine district managers and three regional directors, it maintains close control over the day-to-day operations of each store (A. 353, 596, 739). The Secretary's action was commenced after an investigation of three of Fields' Florida stores (located at Tallahassee, Eau Gallie and Merritt Island) under the direction of two different district managers revealed identical apparent violations of the Equal Pay Act (A. 590, 598, 739).

The Secretary alleged that Fields paid its women department managers, called "Area Supervisors," less than it paid their male counterparts for doing equal work. This discrimination arose in part from Fields' published practice of paying lower wages to managers of softlines of merchandise (clothing), who were generally women, than it paid to managers for hardlines (all lines other than clothing), who were generally men (Pet. App. 6a–7a; A. 504–505, 782). The Secretary alleged that work of softline and hardline man-

[3] "A." refers to the parties' Appendix in the court of appeals.

agers was equal for the purposes of the Equal Pay Act, and that, in any event, within each of these job categories, female managers were paid less than male managers for equal work (Pet. App. 6a–7a).

While the district court rejected the Secretary's argument that softline and hardline managers did equal work (Pet. App. 28a–29a, 31a), it nonetheless found numerous instances of sexual discrimination within both of these categories. Thus the court found that since February 1966 male hardline managers in the Tallahassee store have been paid an average ranging between $.35 and $.45 cents per hour more than female hardline managers in that store (Pet. App. 29a).[4] The court also found an average $.35 per hour pay difference between male and female softline managers in that store for the period from September 1966 to February 1969 (*ibid.*).[5]

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[4] The difference was such that some female hardline managers in that store were paid less than male softline managers. Thus, for example, Peggy Smith, who worked at the Tallahassee store as a manager for curtains and domestics (a hardline department), was paid less than either David Hawthorne or John Costoldi, who both worked in softline departments (Pltf's Exh. 3), although only Mrs. Smith used the "pre-print" method of ordering (A. 138–140, 143–147), which, according to Fields, required greater skill and responsibility (Pet. App. 28a–29a). (Fields claimed in a posttrial motion and on appeal that "curtains and domestics" was not a "hardline" department (Pet. App. 9a). This contention, which was contrary to the testimony of Fields' Director of Industrial Relations and two of its store managers (A. 472, 717, 721, 721a, 815), was not adopted by the court below.)

[5] Thus, for example, Elaine Hanna (manager of infants' and children's wear at the Tallahassee store) was paid five cent per hour less than David Hawthorne (manager of men's and boy's wear), although she had more experience and greater

In Eau Gallie, the court found, Fields paid male hardline managers an average of $.27 per hour more than female hardline managers between June 1965 and May 1969 (Pet. App. 30a).[c] The court found two violations in the Merritt Island store. Shirley Giannini, the manager for the hardline departments of curtains and domestics, received an average of $.20 per hour less than the male hardline supervisors in that store. Mrs. Giannini received $.23 per hour less than Steve Shytle, the housewares manager, even though Mrs. Giannini had more seniority and had been rated as an "outstanding department manager in all respects," whereas Mr. Shytle was on probation for repeated poor work performance (Pltf's Exh. 5; A. 454). Also the court found that between June 1965 and November 1966 Mildred Sutherland was paid, for managing the hardline department of health and beauty aides at the Merritt Island store, an average of $.40 per hour less than the store's male hardline supervisors.

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seniority and had received a letter from the store manager thanking her for her outstanding work and complimenting her as one of the top ten department managers in the company, whereas Mr. Hawthorne was only an "average" employee (A. 126–127, 110–111, 179; Pltf's Exh. 3).

[c] Thus Lorraine Lunden, the female supervisor for small appliances and cameras at the Eau Gallie store, was paid 17 cents per hour less than the male supervisor for sporting goods (George Bayne), although Mrs. Lunden had more experience and greater seniority and had been awarded the prize for having managed the department with the greatest sales increase in the entire chain (A. 229–230; Pltf's Exh. 4). Similarly, Olga Sims, who replaced Richard Varney as supervisor of the men's department at the Eau Gallie store, was paid 63 cents per hour less than Varney, although both had been hired with almost no experience (Pltf's Exh. 4).

The evidence also established a centralized control by Fields of the chain's outlets. While Fields correctly states (Pet. 6) that the policy of the company was to make the individual store managers responsible for recruiting and hiring, it was undisputed that the *initial* hiring at each new store was handled by either the regional personnel director or by a representative from the New York office (A. 354, 419, 528, 552).[7] The initial hiring rates would establish the pay pattern for the store. The authority of the store managers to set subsequent wage rates was further limited by "directions from our central office as to the amount of budget to be used for payroll" (Pet. App. 39a) and by other "guidelines," including "a [wage] survey" that made them aware of "what the scale was for the entire area" (Pet. App. 43a). Nor could the store managers raise the rates of any of their employees without first "institut[ing] a request for an increase in pay and forward[ing] it to the district manager" (Pet. 44a; see also A. 261, 357, 393, 414–416, 562, 599–600, 606, 779, 786–787, 827). Indeed, the New York office conducted an audit of the wage structure of each store following the enactment of the equal pay bill, after which it advised the store managers that it had reviewed their "current situation" for possible equal pay violations and had found that their companies were "in full compliance of the new law" (A. 867; see also A. 349–350, 360–361, 406, 409).

[7] As a result of this policy, the manager of the Eau Gallie store could point to only three area supervisors personally hired by him (A. 552).

The district court concluded that "J. M. Fields, during the periods in question, hired and paid its employees at whatever rate it could get them, the overall result of which was to discriminate against women" (Pet. App. 31a). Pursuant to this finding and the evidence of centralized control the court issued a chain-wide injunction against further violation of the Equal Pay Act.

2. On Fields' appeal, the court below affirmed the trial court's issuance of a chain-wide injunction, noting that the "[e]vidence introduced at trial indicated that Fields' hiring and wage policies were subject to centralized control of a significant degree" (Pet. App. 17a). As the court explained, "[i]t would frustrate the broad purposes of the FLSA in suits involving large corporate defendants with extensive branch operations to require the Secretary to investigate and prove violations in all or substantially all of the defendant's branches to justify the issuance of a chain-wide injunction" (*ibid.*), particularly where, as here, the violations resulted from a company policy of hiring and paying employees at whatever rates the market will bear.[8]

[8] In the last paragraph of its original opinion, the court expressed the view that the injunction should be limited to the one category of employees involved in violations, *i.e.*, the "area supervisors," but this paragraph was subsequently withdrawn pursuant to the Secretary's petition for rehearing (Pet. 19a). As the Fifth Circuit stated in another case, "we find no legal justification in compartmentalizing an employer corporation in order to warrant an injunction against illegal employment practices to be applied only as to the particular job category in which the violation occurred" (*Hodgson* v. *First Federal Savings and Loan Assn. of Broward County, Fla.*, 455 F. 2d 818, 826).

On the Secretary's cross-appeal, which questioned the correctness of the trial court's holding that the violations were not "willful" within the meaning of the Portal-to-Portal Act's 3-year statute of limitations, as well as its holding that the hardline and softline supervisor jobs were unequal, the case was reversed and remanded for further proceedings. On the "willfulness" issue, the court of appeals noted that the trial judge did not have the benefit of its decision in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139 (C.A. 5), certiorari denied, 409 U.S. 948, when he held that the violations were "the unintended result of Fields' practice of hiring persons at whatever wage it could" (Pet. App. 13a). Then, after reviewing the evidence which established that Fields was fully aware of the Act's equal pay provisions, the court of appeals concluded that the violations were "willful" in the civil sense, and that they could not be excused, as Fields argued, on the ground that they constituted a "random" pattern of discrimination. "To allow exceptions for 'random' discrimination," said the court, "would sap much of the [Equal Pay Act's] vitality * * * [and] create unnecessary problems for future courts attempting to construe the Act" (Pet. App. 14a–15a).

On the issue of the equality of the softline and hardline jobs, the court concluded that the jobs were "substantially equal", noting that in both job categories the managers "were responsible for ordering merchandise, for assisting customers with their purchases, and for maintaining orderly and properly displayed racks of merchandise in their respective departments" (Pet. App. 10a–11a). The court of appeals reversed the district court's finding that the hardline jobs

required greater "skill" (Pet. App. 11a) and remanded the case for the district court to "explain its reasons for finding distinctions between hardline and softline in terms * * * [of effort and responsibility]" (Pet. App. 13a).

ARGUMENT

The two issues currently presented for review were correctly decided by the court below. The third question, whether hardline and softline jobs are equal, is not ripe for review in view of the remand of this issue for further findings. Certiorari at this stage of the proceedings would therefore result in piecemeal review. Such review is especially inappropriate since the resolution of the two issues presented here would not aid the trial court in deciding the remaining issues. *Firemen* v. *Bangor & A. R. Co.*, 389 U.S. 327; *Cobbledick* v. *United States*, 309 U.S. 323, 325; *American Construction Co.* v. *Jacksonville, Tampa and Key West Ry. Co.*, 148 U.S. 372, 384–386, 387.

1. The injunction challenged here is identical in scope to almost every other injunction issued under the Fair Labor Standards Act. It is directed against the employing company, without any geographic or unit limitation, and enjoins violations of the specific provisions of the Act shown to have been violated. Although there may be situations where such a company-wide decree would not be warranted, it is settled that the decree "should operate as an effective deterrent to a repetition of the unlawful conduct" (*United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186; *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192–

193). Under this standard, the courts have routinely issued company-wide decrees, based on violations at only one establishment, where the defendant operates a chain store or other multi-unit operation (see, *e.g.*, *Wirtz* v. *Ocala Gas Company*, 336 F.2d 236, 240-241 (C.A. 5); *Tobin* v. *Frost-Arnett Co.*, 13 WH Cases 566, 34 Labor Cases, ¶ 71,220 (W.D. Tenn.), affirmed *per curiam*, 264 F.2d 246 (C.A. 6); *Chambers Construction Company* v. *Mitchell*, 233 F.2d 717, 725 (C.A. 8)). Such injunctions are particularly appropriate where, as here, the violations are the result of a company policy (*Beneficial Finance Co. of Wisconsin* v. *Wirtz*, 346 F.2d 340, 344 (C.A. 7)). Similar decrees have also been issued by the National Labor Relations Board. See, *e.g.*, *J. P. Stevens & Co.* v. *National Labor Relations Board*, 380 F.2d 292 (C.A. 2), certiorari denied, 389 U.S. 1005; *National Labor Relations Board* v. *Great Atlantic & Pacific Tea Company*, 408 F.2d 374 (C.A. 5); *Decaturville Sportswear Co.* v. *National Labor Relations Board*, 406 F.2d 886 (C.A. 6).

The two cases cited by Fields (Pet. 12–15), *Hodgson* v. *Corning Glass Works*, 474 F. 2d 226 (C.A. 2), affirmed, No. 73–29 (decided June 3, 1974), and *Hodgson* v. *American Can Company*, 440 F. 2d 916 (C.A. 8), do not hold otherwise. In those cases, which do not involve chain stores, the violations occurred at specific manufacturing plants and were not shown to have been the result of any company-wide policy. Indeed, in *Corning* the court of appeals emphasized that the violations "were largely a result of the [local]

New York law" (474 F. 2d at 236). Moreover, the court noted that in the "only other cases where a similar violation might exist * * * [in states other than New York] the Secretary had * * * already instituted [separate] suit[s]" (474 F. 2d at 236).[9]

Here, identical violations were established at each of three stores, even though the stores were located in two of Fields' nine districts and thus were under the jurisdiction of two different district managers (A. 739). The evidence also established that the initial hiring was handled by either the regional or home office (A. 354, 419, 528, 552) and that subsequent hiring rates were established in accordance with Fields' published salary ranges (A. 393–394, 416–417) and its policy of giving considerable weight to the applicant's past salary or to the rate at which the applicant would work (A. 462, 528, 549, 561, 784–785, 807)—a policy which, as the court below recognized, resulted in the equal pay violations.

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[9] The other cases cited by petitioner (Pet. 12) are equally inapposite. Thus, unlike the decree reviewed by this Court in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, which attempted to restrain violations wholly unrelated to any that had been charged and found by the Board (312 U.S. at 432–433), the decree here is limited to violations "which are of the same type or class as [the] unlawful acts which the court has found to have been committed" (312 U.S. at 435). And in *Federal Trade Commission* v. *Broch & Co.*, 368 U.S. 360, the Court, after emphasizing the Commission's "wide discretion to formulate a [decree]," upheld its authority to enjoin certain conduct prohibited by the Clayton Act not only in transactions involving the seller and buyer with respect to whom a violation had been established, but also in transactions involving *any* seller and buyer (368 U.S. at 363–364).

Contrary to Fields' assertion (Pet. 18), the issuance of a chain-wide injunction does not create a presumption of wrongdoing at Fields' other establishments. In any subsequent proceeding against Fields, the Secretary must still prove that violations have occurred, and the burden of this issue is the same as it was in the original action. Fields, moreover, will "still be able to raise questions of law and of good faith as freely as in the original suit for an injunction" (*Mitchell* v. *Pidcock*, 299 F. 2d 281, 287 (C.A. 5)). It is true that Fields, if found in contempt, will be required to pay the cost of the investigation and subsequent legal proceeding. This requirement, however, does not represent a punishment but, like the restitution of unpaid wages, is "compensatory only" (*Mitchell* v. *DeMario Jewelry*, 361 U.S. 288, 293; *McComb* v. *Jacksonville Paper Company, supra*, 336 U.S. at 193) and is designed to "shif[t] the responsibility for compliance onto the employer's shoulders" (*Goldberg* v. *Cockrell*, 303 F. 2d 811, 814 (C.A. 5)).

2. The holding below that violations are "willful" for purposes of the 3-year statute of limitations applicable to civil suits (29 U.S.C. 255, as amended by the Fair Labor Standards Amendments of 1966, 80 Stat. 830, 844) if "the employer kn[e]w [that] the FLSA was in the picture" and had to be considered (Pet. App. 14a), not only accords with the numerous decisions construing this term (*Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139, 1142 (C.A. 5), certiorari denied, 409 U.S. 948; *Brennan* v. *Heard*, 491 F. 2d 1, 3 (C.A. 5); *Brennan* v. *General Motors Acceptance*

Corporation, 482 F. 2d 825 (C.A. 5); *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C.)) or its equivalent in other civil legislation (*Local 189, United Papermak. & Paperworkers* v. *United States*, 416 F. 2d 980, 996 (C.A. 5), certiorari denied, 397 U.S. 919; *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 796–797 (C.A. 4), certiorari dismissed, 404 U.S. 1006; *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245, 250 (C.A. 10); *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1201 (C.A. 7), certiorari denied, 404 U.S. 991), but, we submit, is also required by the "liberalizing intention * * * of Congress" (*Jiffy June Farms, supra*, 458 F. 2d at 1142) in enacting the 1966 Amendments (see, *e.g.*, 111 Cong. Rec. 10794). The 3-year statute is part of the Act's civil sanctions, which are compensatory in nature and which should not be interpreted to permit Fields to shift the burden of its "poor judgment" (Pet. 23) to its women employees.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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